The Dissertation Committee for Thomas Rives Bell Certifies that this is the approved version of the following Dissertation:

The Architectonic Constitution: Higher Order Principles and Separation of Powers Conflict

Committee:

Jeffrey K. Tulis, Supervisor

Josh Chafetz

Gary J. Jacobsohn

Hersel W. Perry, Jr.

The Architectonic Constitution: Higher Order Principles and Separation of Powers Conflict

by

Thomas Rives Bell

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Dedication

To my parents, Robert and Cheryl, whose love and support have made this possible.

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This dissertation began with a seminar paper on recess appointments that I wrote for Jeffrey K. Tulis during my first year in graduate school. In that paper I argued that the case should be left to the political process rather than decided by the judiciary. Professor Tulis told me at the time that what I had done in that paper, which I perhaps did not even realize, was to show how the legal resolution of that case had undermined the higher order commitment of the Recess Appointments Clause — and, moreover, that I could write a dissertation elaborating on that theme! Professor Tulis has always seen the potential in my work and helped me to draw out the larger implications. No one has taught me more about politics, and I could not be more fortunate and grateful to count myself as one of his students.

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Abstract

The Architectonic Constitution: Higher Order Principles and Separation of Powers Conflict

Thomas Rives Bell, Ph.D.

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Supervisor: Jeffrey K. Tulis

Separation of powers is typically understood in terms of constraint. In this view, the Constitution provides a static legal framework intended primarily to control and limit politics. The purpose of this dissertation is to consider how separation of powers values are undermined by an overly literal conception of the textual provisions that bring the political branches into contact. Indeed, this dissertation argues that the Constitution was not intended to be a static legal framework unadaptable to the needs and exigencies of modern circumstances. Rather, as argued most persuasively in *The Federalist*, the Constitution instantiated a dynamic political order in which differently-constructed institutions advance the aims and prerogatives of their institutions in political conflict, this conflict meant to achieve the overlapping and at times competing goods of the constitutional order. A narrow focus on the literal strictures of the textual provisions that bring the branches into contact can frustrate — and potentially undermine — this dynamic process. The burden of this dissertation is borne by three case studies — on the legislative veto, executive agreements, and recess appointments. Each case study evaluates the constitutional dimensions of departures from the literal strictures of the text, demonstrating how such departures are

both fostered and limited by the purposes undergirding the constitutional text — and how legal resolution based on the literal meaning of the text undermines robust constitutional politics. This dissertation thus argues that interbranch disputes regarding the limits of the political branches' powers — insofar as those conflicts do not infringe upon the rights of individuals — should be left to the political negotiations of the branches. Such political negotiation, however, is not standardless. Rather, the branches engage (or should engage) the constitutional text at a higher level of abstraction, arguing about the purposes of assigned powers in light of the duties and prerogatives of their offices. Brightline, legalistic rules that settle the constitutional text — without reference to the particular contexts that give rise to textual departures — are inattentive to, and potentially subvert, the higher order purposes of the constitutional order.

Table of Contents

List of Tables

Introduction

According to a prominent narrative in political science today, the concept of separation of powers is in a state of crisis, suffering, as Adrian Vermuele and Eric Posner argue, "through an enfeebled old age."[1] Indeed, the static legal framework the separation of powers principle embodies, with its strict separation of different types of powers and checks and balances, is viewed as a (if not the) fundamental problem of American government today. The Constitution's governmental framework, the narrative goes, was designed for the relatively simple agrarian society of the 18th and 19th centuries, but has proven unworkable in light of the demands of modern government in the contemporary world. Perhaps the most striking recent indictment of the American constitutional order's institutional arrangement comes from prominent political scientists William G. Howell and Terry M. Moe in their book aptly titled *Relic: How Our Constitution Undermines Effective Government*. Howell and Moe criticize the separation of powers framework — and especially the parochial Congress at its center — as ultimately creating an ineffective government due to its emphasis on constraint:

> If government is to address the myriad problems that arise in the modern world, it must be able to act, and act effectively. But it literally wasn't designed for that. It was designed for a different, pre-modern world. It is folly to think that what may have worked quite well in that world will also work in ours. Why would it? The founders had no idea what a modern society would look like, no idea what demands and problems it would generate, no idea what governmental

[1] Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford [England] ; New York: Oxford University Press, 2010), 208.

> effectiveness would require in such a context. They could not provide us with a government suitable for modern times even if they intended to.[2]

This indictment of the Constitution's inability to provide for effective governance should perhaps come as no surprise given the extent to which the separation of powers itself has, throughout American history, been characterized by its *negative* purposes. Justice Louis Brandeis famously wrote that "the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."[3] Brandeis' dictum that the separation of powers doctrine favors safety over and against efficiency and effectiveness, moreover, has carried the day in Supreme Court jurisprudence as the Court has increasingly policed the boundaries of the political branches.[4] In striking down the legislative veto, for example, Chief Justice Burger asserted that "convenience and efficiency are not the primary objectives — or the hallmarks — of democratic governance," and that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[5]

This dissertation is diagnostic in purpose.[6] The diagnosis it makes, however, is fundamentally different from those cited at the outset of this introduction. The problem with the separation of powers is not that it is a static legal framework meant primarily to

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[2] William G. Howell and Terry M. Moe, *Relic: How Our Constitution Undermines Effective Government--and Why We Need a More Powerful Presidency* (New York: Basic Books, 2016), 23.
[3] Myers v. United States, 272 US 52, 293 (1926).
[4] Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*, Princeton Studies in American Politics (Princeton, N.J: Princeton University Press, 1996).
[5] *INS v. Chadha*, 462 US 919 (1983)
[6] Charles U. Zug, "Could Political Science Become Diagnostic? Restoring a Forgotten Method," *Perspectives on Political Science*, December 2017.

frustrate the arbitrary use of power, thus hindering the ability of the government to adapt itself to meet the needs and contingencies of unforeseen circumstances. Rather, the problem is that the separation of powers has been wrongly understood in terms of constraint rather than in terms of positive purposes, and that this flawed conceptualization has been incorporated into modern understandings of separation of powers — especially by the judiciary — in ways that have undermined effective constitutional government. As this dissertation will argue, however, this misunderstanding is not a blatant mischaracterization of the nature of the Constitution's governing apparatus as much as it is a failure of the framers to fully and self-consciously develop and articulate the type of separation of powers system the Constitution embodies. Even so, I will argue that the separation of powers framework articulated in this dissertation is not only the best interpretation of the nature of separation of powers principles in *The Federalist*, but that it is also a superior understanding of separation of powers on its own terms — a claim that is best borne out through case study analysis as opposed to proof-texting.

Contrary to the constraint-oriented focus of many contemporary diagnoses of American constitutional ills, this dissertation argues that the Constitution's legal assignments of powers and checks and balances are subordinate aspects of a larger political conception of separation of powers that emphasizes the achievement of constitutional ends through conflict within and between differently structured political institutions.[7] By focusing on the political dimensions of separation of powers I show that

[7] Jeffrey Tulis, *The Rhetorical Presidency* (Princeton, N.J: Princeton University Press, 1987), 41–45; Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton [New Jersey]: Princeton University Press, 2013).

the Constitution provides every resource for meeting the needs of modern society while preserving its basic shape as the institutions respond to each other in politics, making political claims about the purposes underlying specific assignments of power rather than advancing narrowly legalistic (and overly literal) conceptions of their assigned powers, or turning to the judiciary to settle their political disputes (as the branches increasingly have done). Political contestation between the branches regarding both the substance of politics as well as their respective boundaries, I argue, is a virtue of the constitutional order, not a pathology that should be overcome through legal determinacy and settlement. In fact, as this dissertation will demonstrate, legal settlement of interbranch boundaries (whether by the branches' own narrow, and overly literal, conceptions of their assigned powers, or through judicial intervention) not only misunderstands the fundamental nature of the Constitution's separation of powers system, it pathologizes, rather than removes, political contestation from the constitutional order.

A robust constitutional politics, however, is not standardless, the result of any political resolution agreed upon by the branches. It is not, in other words, politics all the way down. Rather, the branches should be guided by constitutional criteria deduced both from the text and from the underlying purposes of specific constitutional provisions in service of the aims and goals of their particular institution vis-a-vis the other. The kind of reasoning appropriate to the political branches in interbranch contestation, however, differs substantially from the way the Court reasons about the meaning of the Constitution because, by its very nature, the judicial function is about settling the meaning of constitutional provisions, drawing bright-line rules in ways that foreclose

future contestation — and this, ultimately, without any reference to the political circumstances animating the interbranch dispute in the first place. Legal settlement premised upon an overly *literal* conception of constitutional clauses, however, is, in general, inappropriate to interbranch disputes regarding the textual boundaries between the branches.[8] Rather, in addition to the literal level, the branches engage (or should engage) the constitutional text at a higher level of abstraction, making arguments about the purposes underlying particular clauses (and the institutional duties signified by the constitutional text) vis-a-vis each other in specific political controversies.[9] At times, a branch might have a valid constitutional claim to violate the express terms of the constitutional text based on the underlying purpose of that textual provision, depending on the political circumstances that give rise to the claim. Settling the meaning of the text in an overly literal or legal sense, on the other hand, can thwart constitutional purposes rather than advance them, and, over time, can corrode the ability of the branches to reason about the Constitution politically. In short, this dissertation is concerned with the larger constitutional commitments signified by, but not reducible to, their textual instantiations.

This introduction will proceed by laying out what might be referred to as the "traditional" conception of separation of powers with which this dissertation contends.

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[8] There are, of course, instances where judicial intervention into interbranch disputes between the political branches is justified. As I will argue, judicial intervention is appropropriate when the judiciary's own processes are implicated by a particular dispute or when the dispute concerns the rights of individuals. Such circumstances, however, are fairly limited. In general, the Court should avoid policing the boundaries of the political branches.

[9] This is true, moreover, regardless of how self-consciously the branches make constitutional arguments. This is a point that will be elaborated in the conclusion.

By calling it the traditional view, I do not mean to suggest that there is one particular theorist, or theorists, to whom this conception can be attributed. Even so, it is possible to distill the basic underpinnings of widespread understandings of the purposes of separation of powers and to highlight the ways in which essential aspects of the traditional view inform constitutional analysis. The conception of separation of powers articulated in *The Federalist* is more complex than commonly recognized. Something like the traditional conception is articulated in places, most clearly in Number 51. *The Federalist* as a whole, however, articulated a more dynamic conception of the separation of powers than the common, constraint-based understanding. According to this view, separation of powers and checks and balances are subsidiary, though essential components, of a larger, and—as Jeffrey Tulis and Nicole Mellow have argued—altogether *new* political design that emphasizes the ways in which conflict between institutional structures can advance the positive purposes of the constitutional order, rather than merely restrain or limit the government in order to make it safe.[10]

This dissertation builds on work by Tulis and Mellow, as well as Mariah Zeisberg to consider what it means for the political branches to be guided by political criteria that is constitutional but not legalistic. In other words, even when the branches depart from the literal strictures of the constitutional text, the branches can and should be guided by the underlying values signaled by the text, a task that is undermined by focusing too strictly on the letter of the law. The bulk of this dissertation, therefore, consists of case

[10] Jeffrey K. Tulis and Nicole Mellow, *Legacies of Losing in American Politics* (Chicago: University of Chicago Press, 2017), http://www.press.uchicago.edu/ucp/books/book/chicago/L/bo27315255.html.

studies — on the legislative veto, executive agreements, and recess appointments — to demonstrate how the branches can negotiate their boundaries according to the constitutional principles undergirding the text through their own interactions (whether self-consciously or not) and, moreover, how this process is undermined by judicial resolution based on an overly legalistic reading of the text, or by the branches' own failures to be sufficiently motivated by higher order principles during interbranch conflict. In other words, this dissertation considers how the Constitution's textual assignments of power signal a hierarchy of constitutional goods that are not reducible to those specific textual instantiations of power. Attentiveness to the overarching purposes of the text thus provides a way to both constitutionally evaluate departures from the literal strictures of the text while also showing how strict adherence to the text, in a literal sense, can undermine those purposes. This chapter thus concludes by discussing the three case studies and the reasons for their selection.

TRADITIONAL VIEW OF SEPARATION OF POWERS

As noted at the outset, separation of powers is generally understood in terms of constraint. The Constitution, in this view, established a legal framework in order to channel governmental action within specified limits, the preservation of liberty — or natural rights — often serving as the justification for the emphasis on constraint.[11] While, in general, separation of powers is understood in terms of constraint, different aspects of

[11] Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, New Jersey: Princeton University Press, 2013); Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame, Ind.: University of Notre Dame Press, 1997).

the constitutional design are emphasized by different sets of scholars and practitioners. Legal scholars — and, perhaps more importantly, jurists — tend to focus on the *legal* aspects of separation of powers, whereas political scientists emphasize checking and balancing. It is worth dwelling on each of these distinct and interrelated features of the constitutional design in turn. This is especially important given that an overemphasis on either feature of the traditional understanding, as I will argue, is problematic. To focus too much on the literal meaning of the constitutional text, when it comes to separation of powers disputes, can prevent the branches from negotiating their boundaries in politics to achieve the ends of the constitutional order, or can blind the branches to the duties signified by textual commitments. Similarly, an overemphasis on checks and balances inappropriately magnifies the political aspects of separation of powers, reducing interbranch contestation to pure struggle and negotiation without constitutional standards for evaluation. Disentangling these two interrelated features of the constitutional design, of course, is a theoretical exercise given the extent to which both features are intertwined in both theory and practice. Discussing these different, albeit connected, emphases separately, however, illuminates core features of the common understanding of separation of powers and how both emphases miss the ways in which the constitutional text signals a hierarchy of constitutional values undergirding the text.

Legal Notions of Separation of Powers

Legal scholars tend to emphasize a separation of powers doctrine by which the natures of different types of powers — legislative, executive, and judicial — are

discerned and assigned to the appropriate institution. The branches, moreover, are prohibited from exercising powers appropriately assigned to the other branches. This separation of powers theory or doctrine is clearly summarized by MC Vile in *Constitutionalism and Separation of Powers*:

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.[12]

This general principle of separation has been the basis for the judiciary's intervention into separation of powers disputes, attempting to ensure that the branches remain within the specified limits of their powers based on the *types* of powers the branches purportedly exercise. For example, when the Court invalidated the legislative veto as an unconstitutional legislative usurpation of executive power it did so based on the presumption, noted by Chief Justice Burger, that the "Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility."[13] The Court acknowledged that the branches are not "'hermetically' sealed off from one another," but

[12] M. J. C. Vile, *Constitutionalism and the Separation of Powers*, 2 edition (Indianapolis: Liberty Fund Inc., 1998), 11.
[13] INS v. Chadha, 462 US 919 (1983), at 951.

still concluded that when any branch acts it presumptively exercises the kinds of power granted to it by the Constitution. The Court thus settled an interbranch dispute based on a background principle that stresses the need for strict separation based on the types of powers appropriately wielded by different types of institutions.

Legal understandings of separation of powers, however, do not necessarily depend upon some overarching background principle or doctrine of separation that can be invoked by the judiciary to settle interbranch disputes. In fact, as John F. Manning has argued, the Constitution embodies no separation of powers principle (an important concession, but one from which Manning, as will be shown in this dissertation, does not draw the right conclusions).[14] Indeed, the Constitution does not have an express separation of powers clause limiting the different branches to the exercise of the types of functions appropriate to their institution (even though the judiciary has at times invoked background principles of separation in its jurisprudence). This, moreover, cannot be easily characterized as an oversight given that many of the state constitutions at the time of the founding had such express provisions in their constitutions that the framers could have easily adopted. For example, the 1780 Massachusetts state Constitution stated:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws, and not of men.[15]

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[14] John F. Manning, "Separation of Powers as Ordinary Interpretation," *Harvard Law Review* 124, no. 8 (2011): 1944–45.

[15] Part the First, Article XXX, of the Massachusetts Constitution of 1780. Retrieved at: http://www.nhinet.org/ccs/docs/ma-1780.htm. Interestingly enough, this Clause has been cited to invoke a

Beyond the fact that the Constitution does not have an express separation of powers clause like the one quoted above, the Constitution, by its own terms, violates a strict division of power by mixing the different types of powers within and between the branches. For example, the president wields legislative power with a qualified veto power. The House of Representatives wields an effectively executive power with its power to impeach executive and judicial officials (akin to an indictment), and the Senate wields a judicial power by its power to convict impeached officials. Such mixing of powers and the decision not to adopt an express separation of powers provision led Anti-Federalists, during the ratification debates, to oppose ratification since the proposed Constitution so thoroughly violated separation of powers principles. In fact, in the First Congress, James Madison asserted that no charge during the ratification debates had been leveled against the proposed Constitution with as much success as the charge that the Constitution violated the principle of separation of powers.[16]

Even without a background principle of separation of powers, an emphasis on legal limits and constraints — and the concomitant settling of interbranch boundaries in light of this emphasis — has dominated the ways in which the separation of powers is understood. Indeed, a fundamental feature of constitutionalism is that it limits by law what the government can do. As Jon Elster writes, "the constitution should be a framework for action, not an instrument for action."[17] In this way, the Constitution

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background principle of separation of powers, perhaps most notably by Justice Antonin Scalia at the outset of his famous dissent in *Morrison v. Olson* 487 U.S. 654 (1988), at 486.

[16] Annals of Congress 380 (1789).

[17] Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge, U.K. ; New York: Cambridge University Press, 2000), 100.

provides the procedural apparatus for government, providing static limits that constrain governmental action. Giovanni Sartori similarly observes that "constitutions are, first and above all, instruments of government which limit, restrain and allow for the control of the exercise of political power."[18] Although there are some exceptions to the view that the primary purpose of constitutionalism is to constrain and limit governmental action, this, as Jeremy Waldron recently observed, "goes against the general trend."[19] From a constraints-oriented notion of constitutionalism, the purpose of a constitution is to provide clear-cut rules to coordinate action, thereby creating the conditions for stability.[20] Consider an analogy: it does not matter whether drivers drive on the right or left hand side of the road, but it does matter that the "rules of the road," so to speak, coordinate drivers through a fixed rule rather than to allow individual drivers to decide for themselves.[21] In a similar way, it is not necessarily important how power is specifically allocated so long as the Constitution effectively coordinates action through a settled understanding of the law and its requirements.

The textual boundaries between the branches, in this view, must be enforced to ensure that the branches perform their assigned tasks in appropriate ways. Absent a background principle of separation of powers, Manning argues that the judiciary should enforce textual boundaries between the branches in those instances where the

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[18] Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (London: Macmillan, 1994), 196.
[19] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, Massachusetts: Harvard University Press, 2016), 30.
[20] Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110, no. 7 (1997): 1359–87.
[21] Alexander and Schauer, 1371.

Constitution is specific. The adoption of a specific, rule-like provision, by the rule of negative implication, suggests that other mechanisms are appropriately ruled out: "If a parent tells a young child who has asked for a drink, 'you may have orange juice,' it almost surely means that the child may not grab a Mountain Dew from the refrigerator."[22] If, therefore, the Constitution provides a specific mechanism for lawmaking — bicameralism and presentment — the judiciary should enforce the specific provision chosen by the constitutional framers based on the plain meaning of the text. Hence, the legislative veto is unconstitutional according to Manning — and the Court — because it was a mechanism by which the Congress (or subsidiary parts of Congress) exercised lawmaking power outside of the Constitution's textually-prescribed procedures for lawmaking.[23] Similarly, and as the Court ruled in *Noel Canning v NLRB* (2014), there are clear textual limits to what counts as a valid recess appointment based on the specific meaning of the Recess Appointments Clause (even based upon the Majority's broad construction of the clause in *Noel Canning*). According to the clear terms of the Clause, if the Senate is in session, at least in a technical sense, then there is no recess available for a recess appointment.

What is important here is not necessarily Manning's specific proposal for how the judiciary can properly decide separation of powers cases, but how he views the

[22] Manning, "Separation of Powers as Ordinary Interpretation," 2010; Harold Koh, "The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?," *The Yale Journal of International Law* 15, no. 2 (June 1990): 335.

[23] Though as I will demonstrate in my chapter on the legislative veto, the only way to characterize the legislative veto as an independent act of lawmaking is to invoke a background principle of separation of powers and to add to that background principle the unargued presumption that when any branch acts it wields the type of power granted to it by the Constitution.

Constitution as a series of textual provisions that must be enforced based on their clear and determinate meaning — insofar as provisions lend themselves to such analysis. It hardly bears mentioning that such an assumption largely undergirds modern approaches to separation of powers. Indeed, while this dissertation argues that the recess appointments controversy in *Noel Canning* should have been left to the political process, the Supreme Court ruled unanimously in that case (while splitting on the specific interpretation of how broadly the Clause should be construed), and there was broad consensus that the case posed a judiciable question and should have been decided by the judiciary. Few, if any, scholars argued at the time that the case posed a political question and should thus be left to politics.

While it is not worth dwelling on at length at this juncture, it bears mentioning here that such an emphasis on enforcing textual boundaries between the branches — as will be argued more in depth in the conclusion — does not make sense of the ways in which constitutional practice has departed significantly from the literal strictures of the constitutional text, for example, in the areas of war powers or international agreements, areas in which, given the foreign affairs context, the judiciary has been reticent to intervene in interbranch disputes regarding the boundaries of the branches due to a lack of judicially manageable standards (even though to enforce boundaries, say, with regard to treaties and executive agreements would only require the judiciary to make the branches abide by the specific constitutional procedure for international agreements

rather than to engage the substance of agreements).[24] Moreover, very few, if any, scholars or practitioners today would argue, for example, in favor of treaty exclusivity, given the extent to which executive agreements have superseded the use of the treaty since at least the Second World War and are viewed as an essential mechanism by which the United States binds itself internationally. Given this discrepancy between modern constitutional practice and the strictures of the text, some, while accepting modern practice as legitimate, see such innovations as instances of major constitutional change. The Constitution's static legal framework, in this telling, has been overcome or "updated" — sometimes by the People based on a theory of higher lawmaking — to make it workable in the modern world.[25] What is noteworthy about the idea that the Constitution has to be overcome or updated is the premise upon which the claim is based: that the Constitution's legal framework provides static limits based on the literal meaning of the text. This premise, moreover, has also informed interbranch behavior as the Court has increasingly made itself the arbiter of interbranch boundary disputes over the last half century — especially in the domestic context — and as the political branches themselves have increasingly turned to the judiciary to settle their boundary disputes.

Finally, many contemporary constitutional theorists view the Constitution's separation of powers as a failure because its legal framework (insofar as it is understood as a legal framework) has proven incapable of restraining executive power. Some, like

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[24] Jide Nzelibe, "The Uniqueness of Foreign Affairs," *Iowa Law Review* 89, no. 3 (March 2004): 941–1010.
[25] Bruce A. Ackerman, *We the People* (Cambridge, Mass: Belknap Press of Harvard University Press, 1991); Bruce A. Ackerman and David Golove, *Is NAFTA Constitutional?* (Cambridge, Mass: Harvard University Press, 1995); Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, N.J: Princeton University Press, 1996).

Bruce Ackerman, propose creating new legal institutions to serve as a check on executive power.[26] Others, such as Eric Posner and Adrian Vermuele, argue that we should not worry about the fact that the Constitution's legal framework cannot constrain executive power because public opinion, properly channeled, can do so.[27] In other words, while Ackerman would add new legal provisions to fix the constitutional system, Posner and Vermuele would cast the entire legal framework aside as unworkable in the first place. Even with their differing prescriptions, both accounts share a descriptive account of the Constitution's separation of powers as a legal framework intended to constrain the overreach of the branches vis-à-vis each other by law.

Checks and Balances

The second emphasis of the traditional view is on checks and balances. Noting that it is theoretically difficult to disentangle the different powers of government — legislative, executive, and judicial — political scientists have emphasized the extent to which the Constitution's separation of powers is primarily geared to frustrating the exercise of power by dividing it between institutions. Central to the concept of checks and balances is the idea that if an institution has a power, another institution must check that power. Moreover, exercises of power are particularly difficult given the many and varied veto points throughout the constitutional system.[28] For example, a bill can only

[26] Bruce A. Ackerman, *The Decline and Fall of the American Republic*, The Tanner Lectures on Human Values (Cambridge, Mass: Belknap Press of Harvard University Press, 2010).
[27] Posner and Vermeule, *The Executive Unbound*.
[28] The veto point is a common unit of analysis in political science studies of the separation of powers. For example, see: Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998); Cameron, *Veto Bargaining* (Cambridge, UK ; New York: Cambridge University Press, 2000).

become a law after it has been passed by both houses of Congress and signed by the President — and even then the legislation is subject to judicial review. Power, therefore, is easily frustrated as any breakdown along the way means that the government cannot act.

The view that the varied veto points throughout the constitutional system are primarily geared towards making it more difficult for the government to act is a plausible reading of *The Federalist*, especially Madison's famous argument in *Federalist* 51 that the division of the government into "distinct and separate departments" — as well as division between the national and state governments — would serve as a "double security to the rights of the people."[29] Philip Munoz, citing Madison's famous line that "men are not angels," argues that "[s]ometimes we forget the whole purpose of the separation of powers is to frustrate government action, to make it harder for government to act."[30] Madison further argues in *Federalist* 51 that the purpose of bicameralism is to provide an antidote to the overwhelming power of the legislature (which he referred to as an impetuous vortex earlier in *Federalist* 48) in republican forms of government. By dividing up the legislature into component parts, Congress will be less likely to abuse its power by passing improvident laws. It is better that it be difficult for Congress to pass good laws than for it to be too easy for it to pass bad laws.

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[29] Alexander Hamilton et al., *The Federalist Papers*, ed. Clinton Rossiter, 1 edition (New York, NY: Signet, 2003), 320.
[30] Vincent Philip Muñoz, "Constitutional Principles: Separation of Powers," The Bill of Rights Institute and Jack Miller Center (Aug. 24, 2012).

The emphasis on checks and balances among political scientists, moreover, tends to emphasize constraint for its own sake. Woodrow Wilson's critique of the separation of powers framework, for example, was based on what he took to be its mechanistic Newtonian underpinnings:

> The makers of our federal constitution followed the scheme as they found it expounded in Montesquieu, followed it with genuine scientific enthusiasm. The admirable expositions of the *Federalist* read like thoughtful applications of Montesquieu to the political needs and circumstances of America. They are full of the theory of checks and balances. The president is balanced off against Congress, Congress against the President, and each against the courts. Our statesmen of the earlier generations quoted no one so often as Montesquieu, and they quoted him always as a scientific standard in the field of politics. Politics is turned into mechanics under his touch. The theory of gravitation is supreme.[31]

As Michael Zuckert notes, "[a]ccording to Wilson's conception of separation of powers, how powers are divided and separated matters hardly or not at all; what matters is merely that they are separated and can check each other."[32] The Constitution, according to Wilson, needed to be reinterpreted and updated with Darwinian underpinnings so that it could overcome the inertia of ambition counteracting ambition.

Wilson's diagnosis of the problems with mechanistic checking and balancing has proven enduring among constitutional critics and reform advocates. Today, for example, political scientists William G. Howell and Terry M. Moe, in ways largely reminiscent of Wilson and the Progressives, argue that the Constitution's checks and balances make it nearly impossible for the government to act, and, when it does, to produce good policy

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[31] Woodrow Wilson, *Constitutional Government in the United States*, Columbia University Lectures ... George Blumenthal Foundation 1907 (New York: Columbia University Press, 1947).
[32] Michael Zuckert, "On the Separation of Powers: Liberal and Progressive Constitutionalism," *Social Philosophy and Policy* 29, no. 2 (July 2012): 359.

given the varied veto points that stymie effective governmental action.[33] Therefore, they advocate for a constitutional amendment that would give the president more agenda-setting power (similar to fast-track trade authority, by which Congress delegates to the president the power to negotiate trade agreements while ensuring a timely vote without amendments). The Madisonian system, in their view, must be updated with a formal amendment because it has proven incapable of being adapted to the contingencies of modern government. What is particularly striking about Howell and Moe's reform proposal, however, is that it is based on a successful institutional reform adopted by the political branches themselves through their own political negotiation.[34] As will become clear in the chapter on the legislative veto, Congress and the president have often developed mechanisms by which executive power is harnessed through delegation while ensuring an attenuated role for Congress. The judiciary, however, has proven the enemy of such institutional adaptations, thus lending credence to the view, expressed by Howell and Moe, that the Constitution's static legal framework was not intended for the kinds of adaptation that would make good and effective government possible.

Much of the American politics literature today, moreover, accepts Richard Neustadt's premise that there is no separation of powers. Rather, the Constitution establishes "separate institutions sharing power."[35] Power is thus construed as a single entity that is divided up between the branches rather than a principled division of labor

[33] Howell and Moe, *Relic*.
[34] Sharyn O'Halloran, *Politics, Process, and American Trade Policy* (Ann Arbor: University of Michigan Press, 1994), 139–75.
[35] Richard E. Neustadt, *Presidential Power, the Politics of Leadership* (New York: Wiley, 1960).

meant to achieve certain goods through differentiated institutions. Politics, in this formulation, becomes the skillful maneuvering and negotiation of political actors within and between the branches to get what they want through persuasion (in Neustadt's formulation) — or how the branches can effectively mobilize their constitutional powers and institutional tools vis-a-vis the other branch.[36] The Constitution's static legal framework, therefore, establishes the rules of the game that can be exploited to achieve the policy goals of actors within the institutions. Such a focus on institutional actors and how they can maximize their preferences in politics provides no criteria for evaluating the constitutional dimensions of particular settlements in a normative sense (i.e. such analysis does not explain how the purposes of the constitutional text inspire the motives and actions of officeholders in political contestation).

Conclusion of the Traditional View

Whereas an overemphasis on the Constitution's legal parameters prizes settlement for the sake of coordination and stability, an overemphasis on checks and balances stresses politics — or whatever the branches can get away with — within the parameters of the static legal text. While it is impossible to fully distinguish the Constitution's legal framework from checks and balances (especially since political scientists who emphasize checks and balances take the legal framework as a given, as the rules of the game), what should be clear from the preceding discussion is the extent to which the Constitution's

[36] See, for example, William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton [N.J.]: Princeton University Press, 2003); Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (Yale University Press, 2017).

governing apparatus is often understood in terms of constraint rather than positive purposes that can be achieved through differentiated institutions. This is not to say that all scholars and practitioners hold this view. However, it is a dominant enough conception that it is appropriate to characterize the emphasis on constraint as the "traditional" view. Moreover, the emphasis on constraint, as I will demonstrate in my case studies, undergirds modern understandings of the purposes of separation of powers and the Court has increasingly policed the boundaries of the political branches based on legal understandings of the Constitution's assignments of power to the political branches. Hence, the traditional view of separation of powers is not merely a view held by academics. It is the view espoused by the judiciary when it settles interbranch disputes — and as the political branches increasingly legalize their disputes as well.

SEPARATION OF POWERS AS A POLITICAL ARCHITECTURE

While traditional accounts of the purposes of separation of powers — regardless of whether they emphasize the enforcement of legal boundaries or checking and balancing — tend to focus on how the constitutional design is meant to make it more difficult for the government to act, constraint is not the primary focus of the purposes of separation of powers as explained by *The Federalist*. Indeed, Both Hamilton and Madison make clear that the Constitution was not intended to be a static legal framework incapable of meeting the demands of modern government. Time and again, *The Federalist* responds to fears by Anti-federalists about the extensive powers of the proposed national government. For example, Anti-Federalists worried about the dangers a

standing army poses to republican forms of government during times of peace and opposed the Constitution on the grounds that there was no explicit constitutional prohibition on such a practice. The Federalists' response to Anti-Federalist fears was to argue that legal limitations on powers granted inhibit the ability of the government to respond to the unforeseen exigencies of changing circumstances, and, consequently, can undermine the purposes of the constitutional order rather than advance them. As Madison wrote in *Federalist* 41:

> How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose Constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.[37]

In other words, legal limitations on the power of the government meant to make government safe can actually serve to do the opposite, undermining the effective capacity of the government to respond to unforeseen circumstances. While a standing army might, as the Anti-Federalists urged, prove dangerous to the people's liberty, the people's liberty would be *more* imperiled without a government capable of effectively providing for the common defense. *The Federalist* thus argues that the powers of the national government "ought to exist without limitation, *because it is impossible to foresee or to define the*

[37] Hamilton et al., 253.

extent of national exigencies, and the correspondent extent and the variety of the means which may be necessary to satisfy them."[38]

The question thus becomes how the framers attempted to construct a government with the capacity to achieve fundamental constitutional objectives while also ensuring the safety of the people. The answer to this question can be found in the ways in which the framers constructed a government that differed altogether from separation of powers as it had been traditionally understood (and as it is often incorrectly understood today) and substituted in its place, as Jeffrey K. Tulis and Nicole Mellow have recently argued, an altogether new political design meant to vindicate the competing aims of the constitutional order — expression of majoritarian will, vindication of national security aims and energetic administration of government, and the protection of individual rights — through differently configured institutions brought into conflict by their shared powers.[39] The Constitution is thus an attempt to secure certain positive goods through differentiated institutions brought into political conflict.

As already noted, the Constitution does not have a free-standing separation of powers principle that can be easily invoked to settle interbranch disputes based on the type of power appropriately wielded by certain types of institutions, and, in fact, the Constitution violates the terms of what might be considered a pure separation of powers doctrine by mixing the different types of powers within and between the various

[38] Hamilton et al., 149. Emphasis in the original.
[39] Jeffrey K. Tulis and Nicole Mellow, *Legacies of Losing in American Politics*, 54–59; Tulis, *The Rhetorical Presidency*, 41–45; Zeisberg, *War Powers*.

branches.[40] James Madison's answer to the charge that the Constitution violated separation of powers was to argue in *Federalist* 48 that separation of powers was an unworkable concept on its own terms. Parchment barrier distinctions, Madison argued, were not sufficient to prevent the encroachment of the branches on the powers of the others:

> Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government.[41]

Given that power is of an "encroaching" nature, Madison asserts, it is to be expected that the most powerful branch will subsume the powers of the other branches irrespective of the strictures of the law. In republican forms of government, Madison continued, the legislative power necessarily predominates, and is "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Madison's argument, moreover, was not merely theoretical. Rather, Madison argued, after canvassing governmental practice in the states at the time, that separation of powers principles on paper had proven insufficient in the practice of the state governments, resulting in legislative despotism as the legislative branches usurped the functions of the other branches.

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[40] Manning, "Separation of Powers as Ordinary Interpretation," 1944–45.
[41] Hamilton et al., *The Federalist Papers*, 305.

The solution to this problem, therefore, was to make the legislative, executive, and judicial branches independent of each other by grants of power derived from the Constitution, and to give each of the branches all the powers necessary to achieve their governmental objectives while also giving them "partial agency" in the powers of the other branches — checks meant to influence, though not to control, the judgments and actions of the other branches. These checks rely on the ambition of office holders in each of the branches to advance and defend the prerogatives of their branches vis-à-vis the others — as Madison famously declared in *Federalist* 51, "ambition must be made to counteract ambition."

But what is important to stress is that the Federalist's account of separation of powers is more than just an improvement on the older version of separation of powers urged by the Anti-federalists, just modified with the addition of checks and balances so that separation could be better maintained. Rather, the framers departed, although subtly, from the classical understanding of separation of powers advanced by the Anti-Federalists, pointing to the difficulty, even impossibility, of differentiating different types of power from each other in the first place. Madison notes this theoretical impossibility in Federalist 37:

> When we pass from the works of nature, in which all the delineations are perfectly accurate, and appear to be otherwise only from the imperfection of the eye which surveys them, to the institutions of man, in which the obscurity arises as well from the object itself as from the organ by which it is contemplated, we must perceive the necessity of moderating still further our expectations and hopes from the efforts of human sagacity. Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and

> judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reins in these subjects, and which puzzle the greatest adepts in political science.[42]

As Tulis and Mellow argue, *The Federalist* never attempts to define powers by their natures and to then assign those powers to the appropriate branch — as would be appropriate if the framers were merely concerned with maintaining strict legal division between the branches. Rather, the latter half of the Federalist (52-85) is about how differently designed institutions can serve *positive* functions in the constitutional order by bringing to bear different qualities and perspectives on politics.

For example, Congress is the institution meant to reflect the views of a diverse citizenry, geographically dispersed across the nation, by bringing these voices into a plural body in such a way as to foster deliberation — or at least to make deliberation more likely. The different sizes and term lengths of the House and Senate — as well as differing modes of election — are indicative, moreover, of the fact that public opinion is not some monolithic entity, but, rather, that there are short-term and long-term interests, and that adequate provision should be made for the expression of these different majoritarian perspectives.[43] In fact, Madison makes clear in Federalist 62-63 that the Senate is not merely a checking body, but a deliberative body meant to bring a different, more stable, perspective on issues of public importance. While democratic government should be close to the people, provision must also be made for the long-term views of the people.

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[42] Hamilton et al., *The Federalist Papers*, 224.
[43] Federalist 62-63.

The independence and unity of the executive branch — as well as a more open-ended grant of executive power — is meant to induce energy to ensure the effective administration of government and the ability to effectively wield the foreign affairs powers of the United States by structuring an institution to be able to move with great speed, secrecy, and dispatch.[44] While deliberation on the merits of policy is an essential quality for democratic governance, so too is decisive action to administer the government and to summon the common strength in the foreign arena. As Hamilton wrote in Federalist 70, "[i]n the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority."[45] However, such delay — caused by plurality — is a dangerous quality in the executive, merely counteracting "those qualities in the executive which are the most necessary ingredients in its composition — vigor and exposition, and this without counterbalancing any good."[46] Providing for an energetic executive, moreover, was no small concern for the framers after the Articles of Confederation's failure to make adequate provision for effective executive power, leaving the administration of the government for both domestic and foreign affairs in the hands of Congress and executive officials fully

[44] Federalist 70.
[45] Alexander Hamilton et al., 425.
[46] Ibid.

responsible to it.[47] The creation of the presidency was thus an attempt to increase the overall capacity of the government, to make government better and more effective. The structural dimensions of the executive branch — independence, unity, competent powers, and re-eligibility — are the ingredients for securing the energy sufficient to achieve these ends.[48]

Finally, the Court is biased towards the protection of rights, and its mode of selection by the political branches (to ensure appropriately qualified people sit on the bench), life tenure, and a small, collegial body are meant to induce the quality of judgment in particular cases and controversies. Its insulation from public pressures enables it, moreover, to rule in a disinterested manner even against the majoritarian impulses more likely to be expressed through a legislature closely connected to swings in public opinion.

The branches, therefore, based on their differing electoral constituencies and institutional designs make provision for different perspectives on the public good, perspectives, moreover, that at times conflict. Majoritarian will at times conflicts with the need for decisive action outside of the parameters considered by Congress. Individual rights are often in deep conflict with both majoritarian will and the decisive actions of the President to vindicate the aims of national security. Because of these different institutionally-induced perspectives, when confronted with the same question it is

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[47] Charles C. Thach, *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* (Baltimore: Johns Hopkins Press, 1969); Louis Fisher, "The Efficiency Side of Separated Powers," *Journal of American Studies* 5, no. 2 (1971): 113–31.
[48] Gary J. Schmitt, "Separation of Powers: Introduction to the Study of Executive Agreements," *American Journal of Jurisprudence* 27 (1982): 114–38.

possible, even likely, that the branches will reach different conclusions.[49] For example, the President represents the people as a whole and the unitary nature of his office and his role as Commander-in-Chief induce the president to think more in terms of national security than Congress perhaps would. Congress, on the other hand, with its power of the purse and its conglomeration of viewpoints from local constituencies across the country might face a different set of criteria regarding, for example, the use of financial resources, which might place it at odds with the President's judgments about how to use the nation's resources to vindicate national security concerns. Buoyed by a sense of urgency during an international crisis, the political branches might adopt certain policies meant, at least ostensibly, to protect the nation, but do so in a way that infringes the rights of a particular minority group. The judiciary, at least theoretically, can intervene to ensure that laws are generally applicable and do not unfairly target minority groups.

Checks and balances, moreover, are the mechanism by which each branch can defend its judgments vis-à-vis the other branches. For example, the President can veto legislation, and has a great deal of discretion to direct the administration of the laws with an eye towards the national interest. Similarly, Congress can maintain oversight of the executive's discretion, and can enforce its own judgments through the legislative process by refusing to fund presidential initiatives it disagrees with, or by impeaching a President who consistently flouts the deliberative will of Congress.[50] What is important to note here

[49] Jeffrey K. Tulis, "Deliberation Between Institutions," in *Debating Deliberative Democracy*, ed. James S. Fishkin and Peter Laslett (Malden, MA: Blackwell Publishing, 2003); Zeisberg, *War Powers*, 25–29.
[50] Jeffrey K. Tulis, "Impeachment in the Constitutional Order," in *The Constitutional Presidency* (John Hopkins University Press, 2009).

is the *dynamism* of the constitutional framework as the branches engage in politics across time. The exigencies of political circumstances and the president's structural capacities to act energetically mean that the president might at times act in ways unanticipated by Congress based on the needs of the moment. Congress, however, has regular checks — for example, through regular appropriations and power over appointments, investigations, and even impeachment — it can use to oversee, influence, or contest presidential actions up and to the point of removing the president from office.[51] While the Constitution requires — as argued in *The Federalist* — an executive branch that can act with sufficient discretion and dispatch based on his own perception of the needs of the moment, Congress can influence how the president uses that authority by, for example, limiting the types of weapons available to the military. As Josh Chafetz argues, a Congress that is concerned about the United States' assertions of power across the globe might refuse to fund new aircraft carriers or new weapons.[52] Indeed, "[f]uture presidents' decisions about whether or not to initiate a conflict, and how to do so, would be made in the shadow of those past appropriations decisions."[53]

What should be clear from this picture is that legal assignments of power are more than just about restraint, but about creating institutions that think and act in different ways in the service of securing the positive goods of the constitutional order. Checks and balances are not just about thwarting action, but about bringing these different

[51] For an overview of the tools and capacities Congress has available to contest presidential uses of political authority, see: Chafetz, *Congress's Constitution*.
[52] Chafetz, 74–77.
[53] Chafetz, 74.

institutional perspectives on politics into productive contestation both in particular moments of conflict and across time. John Finn thus characterizes American separation of powers as essentially a "dialogic device, or a means of establishing constitutional conversation among the branches."[54] Moreover, there is not a legal principle that can adjudicate the branches' competing political claims — unless, of course, the law itself or the application of the law infringes rights. Rather, as Josh Chafetz argues, "political authority is largely generated through politics and is therefore not knowable in advance of politics."[55] What matters is not merely text, history, and structure, or some legal rule derived in advance about the functional uses of power. Rather, the branches gain political authority by the ways in which they use their determinate constitutional tools in politics to advance competing political claims in particular circumstances. For example, no legal rule can determine the scope of executive privilege in advance of the political circumstances that give rise to such claims. Indeed, both branches have political claims regarding such information — the president to withhold information from Congress for, say, national security reasons, and Congress's need to have information to debate about presidential uses of authority.[56] There is no meaningful legal principle that can be invoked that could possibly balance the competing claims beyond the branches' own negotiation in politics.

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[54] John E. Finn, *Peopling the Constitution*, Constitutional Thinking (Lawrence, Kansas: University Press of Kansas, 2014), 57.
[55] Chafetz, *Congress's Constitution*, 18.
[56] Gary J. Schmitt, "Executive Privilege: Presidential Power to Withhold Information from Congress," in *The Presidency in the Constitutional Order*, ed. Jeffrey K. Tulis and Joseph M. Bessette (Baton Rouge: Louisiana State University Press, 1981); David A. Crockett, "Executive Privilege," in *The Constitutional Presidency*, ed. Jeffrey K. Tulis and Joseph M. Bessette (John Hopkins University Press, 2009).

If separation of powers is understood in this way — as a political architecture meant to achieve governmental ends by bringing differently structured institutions into productive conflict — then the unit of analysis for constitutional fidelity is different than if separation of powers is understood purely in terms of assertions of legal power. The institutions can be assessed by the ways in which they bring to bear the particular governance capacities that are unique to them. This is the argument Mariah Zeisberg makes in a sophisticated elaboration of the political conception of separation of powers.[57] Indeed, Zeisberg argues that it is possible to derive standards from the *structures* of differentiated institutions that can be used to evaluate how the branches engage in politics.[58] How well does Congress engage in deliberation, bringing different (even marginal) points of view into robust debate? How well does Congress wield its investigative powers, debating the uses of presidential exercises of power and thus constraining presidential discretion in the future by making clear what it would consider acceptable executive action? These are important questions given Zeisberg's topic of choice — war powers — insofar as many of the key definitions of the debate (such as what constitutes an act of war in the first place) require political construction and elaboration rather than stemming from clear-cut and determinate constitutional language. How well does the executive branch wield its unique intelligence and epistemic capacities? Zeisberg thus argues that the branches achieve what she refers to as "constitutional authority" not through mere assertions of their legal power, but in how

[57] Zeisberg, *War Powers*.
[58] Zeisberg, 31–40.

well the branches perform their unique governing tasks, engaging the other branches responsively in politics.[59] The structures of the branches, in other words, point to political duties. The branches do not share power merely to check or frustrate the other branch in the exercise of their power, but to bring certain positive goods to the practice of self-government. Why else have differentiated institutions in the first place if the structural dimensions of different institutions cannot provide insight into how to evaluate the functions of those institutions in politics? Constitutional fidelity is measured not by assertions of legal power but by how well the branches wield their institutional capacities in service of their powers. Constitutional authority, Zeisberg contends, is not solely derived from the legal text, but from how the branches mobilize their unique institutional capacities in service of governmental ends in politics, providing content-dependent reasons to obey.[60]

TEXTUAL BOUNDARIES AND HIGHER ORDER PRINCIPLES

This dissertation elaborates on the framework presented above, demonstrating how the political branches should be guided by the overarching constitutional principles undergirding the text. In particular, this dissertation is concerned with how the political branches should negotiate their respective boundaries in ways that are constitutional but not legalistic (i.e. based on the literal meaning of textual provisions). This dissertation thus builds on the notion — developed extensively by others, as outlined above — that

[59] Zeisberg, 45–50.
[60] Zeisberg, 45–46.

institutions are meant to perform positive functions in the constitutional order through their conflict rather than to merely provide a static legal framework that constrains governmental action. Understood as a dynamic political order in which the institutions advance their structurally-induced prerogatives and perspectives in politics it becomes possible to see — and to evaluate — how the branches can adapt and respond to changed circumstances while maintaining the basic character of the constitutional order through political negotiation about their respective boundaries — a political process that is subverted by an overly legalized conception of the powers of the branches. While similar to Zeisberg's relational account of separation of powers, the argument of this dissertation differs from Zeisberg's structural account insofar as the emphasis here is on how the legalization (or judicialization) of political disputes misses the higher order principles undergirding the text and the branches shared powers, whereas Zeisberg focuses on abstracting standards to assess the interactions of the political branches from the structures of institutions themselves.

The central argument of this dissertation is that legal settlement of interbranch boundaries based on literal understandings of constitutional provisions subverts rather than perpetuates the purposes of the separation of powers system, substituting narrow legal reasoning for constitutional politics. Understanding the text in an overly legalistic sense, without attention to the positive purposes of the Constitution, moreover, can lead the branches to fail to fulfill their constitutional functions, using the letter-of-the-law as legal pretense for abandoning constitutional duties signified by their powers. This is true, moreover, whether overly literal interpretations of the text are issued by the judiciary

when it polices the textual boundaries between the branches or whether the branches fail to be sufficiently motivated by constitutional reasoning in their own political interactions. Furthermore, a central claim of this dissertation is that there are instances when a departure from the clear meaning of a textual provision might be justifiable from a constitutional perspective depending on the circumstances that give rise to the action and the types of arguments the branches make to justify such departures. These justifications, however, must be circumscribed by the particular circumstances that give rise to the conflict — hence the problem with bright-line, legalistic rules that do not allow for context-dependent negotiation or contestation between the branches.

How, then, should the Constitution be understood such that what would be considered a clear violation of the constitutional text, from a legalistic point of view, can, in practice, be justifiable in certain contexts? An answer to this question requires understanding the extent to which constitutional provisions are attempts to achieve certain outcomes or constitutional goods — or, conversely, to prevent certain outcomes. The Constitution, in other words, rests on certain theoretical and normative underpinnings. The Constitution is an attempt, albeit imperfect, to instantiate principled commitments in the text in order to make provision for those goods or outcomes in politics.[61] Hence, the Constitution is the framers' attempt to structure the polity they envision in a text. We better understand the text according to its larger purposes and underlying presuppositions, interpreted in light of the polity it seeks to construct. As Will

[61] Sotirios A. Barber, *On What the Constitution Means* (Baltimore: Johns Hopkins University Press, 1984).

Harris argues, unlike a will, letter, or novel, the Constitution "supposes itself to set up a structured world, a second text, where people live and act together."[62] Evaluating constitutional fidelity in interbranch disputes involving their textual boundaries, therefore, requires understanding how the branches are motivated by the higher order principles undergirding the textual provisions that bring them into contact with each other and can muster political arguments about the purposes of the text in light of their own institutional prerogatives in particular circumstances.

As I will show in my case studies, when the Court intervenes in a way that focuses on the literal meaning of the text, without considering its underlying purposes, it can undermine the deeper principle behind the constitutional provision in question. Textual provisions meant to bring about certain outcomes — or to prevent others — are premised upon empirical assumptions that may or may not hold true over time (or in particular circumstances), especially given the contingencies that are endemic to politics. Even the Court has acknowledged in other areas of its jurisprudence that the literal application of a textual provision to changed circumstances (or to circumstances not expected by the drafters of that provision) might undermine its larger constitutional purpose. A particularly striking example of this was Chief Justice Charles Evans Hughes' majority opinion in *Home Building and Loan Association v. Blaisdell* (1934).[63] Chief Justice Hughes argued that, in certain circumstances, upholding the underlying principle of the Contracts Clause required departure from the specific prohibition in the

[62] William F. Harris, *The Interpretable Constitution*, Johns Hopkins Series in Constitutional Thought (Baltimore: Johns Hopkins University Press, 1993), 4.
[63] 290 U.S. 398 (1934)

constitutional text. At issue in the case was a moratorium law on home mortgages, passed in Minnesota at the height of the Great Depression, that briefly extended the time frame for payment and postponed foreclosure sales, thus violating the express terms of the contracts. The law was challenged on the grounds that it unconstitutionally impaired the obligation of contracts. In sustaining the law, Chief Justice Hughes acknowledged the purposes for which the Contracts Clause was enacted. Indeed, at the time of the founding the plight of debtors led to an "ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations" such that "the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened."[64] The Clause was thus intended to ensure the rights of creditors in times of economic emergency. But Hughes pitched the purpose of the Clause at a higher level of abstraction to demonstrate that the Minnesota law — which merely delayed the enforcement of contracts — accorded with the underlying purpose of the Clause to "safeguard the economic structure upon which the good of all depends."[65] While at the time of the founding the economic well-being of the nation was undermined by legislative schemes to undermine creditors, the purpose of the delay in Minnesota was not a class-based act intended to undermine creditors, but, rather, a narrowly tailored attempt (insofar as the law merely delayed the enforcement of the contract for a short period of time) to buttress and safeguard the economic conditions upon which such contractual relationships relied in the first place. In other words, if the framers could see conditions

[64] *Home Building and Loan Association v. Blaisdell* 290 U.S. 398 (1934), at 428.
[65] Ibid. 442.

as they are in the present they might do things differently than they did in light of their own circumstances.[66] The principle, or the end to be attained, is more important than the literal, and context-dependent, application of that principle.

While *Blaisdell* does not implicate separation of powers, it does demonstrate the ways in which constitutional provisions are intended to bring about certain fundamental purposes beyond the specific intentions of the framers and the possibility of reasoning about those principles. Indeed, it would be impossible to foresee every possible contingency to which a provision could apply. But it is possible, nevertheless, to infer the fundamental principle animating the specific application and to reason about how it can be appropriately applied in new contexts such that the fundamental principle expressed by the provision is not undermined by its mechanical application. This, moreover, is a fundamental task if the Constitution is to provide a framework for good governance as opposed to a static legal text to be applied without reference to constitutional goods and how those goods can be achieved in new and unanticipated circumstances.[67]

Returning to separation of powers, this dissertation analyzes the purposes behind the branches' shared powers in an attempt to show how those powers ultimately point to and are meant to foster a type of politics that is undermined by too narrow a focus on the

[66] For a good discussion of this case see, Gary J. Jacobsohn, *Pragmatism, Statesmanship, and the Supreme Court*, 1st edition (Ithaca, N.Y: Cornell University Press, 1977).

[67] This text/principles distinction is at the heart of Jack Balkin's work on living originalism. Balkin, however, is largely concerned with textual provisions that are textually open-ended (such as equal protection) and thus more easily updated with new content based on political constructions of what that conception should include. The argument of this dissertation, with which Balkin no doubt might agree, is that even seemingly determinate constitutional rules are similarly indicative of principled commitments that can be undermined if understood too literally. Jack M. Balkin, *Living Originalism* (Cambridge, UNITED STATES: Harvard University Press, 2011).

literal instantiation of the textual commitments. By leaving political disputes about the limits of their shared powers to be worked out between the branches, political actors are thus encouraged to make constitutional arguments about the merits of their case — arguments framed in terms of the prerogatives of the institution they inhabit — that advance their position in politics subject to contestation from the other branch. This political contestation about interbranch boundaries — guided by constitutional concerns as opposed to narrow legal reasoning — plays out in front of the public which, in turn, has political criteria to evaluate the branches rather than technical legal reasoning that is obscure to the uninitiated in the legal profession. Judicialization of political disputes, on the other hand, is much more likely to take on the language of law in a technical sense, thus obscuring the political and constitutional issues animating interbranch disputes in the first place. Hence, the argument of this dissertation, to be elaborated through the case studies, is that interbranch disputes should be left solely to the political branches insofar as the dispute only affects the power dynamics between the branches and does not, in any immediate sense, adversely affect the rights of individuals. And yet, those interbranch disputes should not be understood in purely political terms, either. This dissertation, in other words, does not advocate an abandonment of the Constitution as law. Rather, it seeks to consider how the Constitution instantiates a political order through law and how the law signals larger commitments that should guide the branches in their negotiations about their respective boundaries. To lose sight of these overarching commitments, on the other hand, subverts and undermines the purposes of the constitutional design.

Constitutional Reasoning

Finally, before introducing the case studies and the rationale behind their selection, it is worth briefly discussing in more depth what it means to reason constitutionally in the sense with which this dissertation uses the term. Constitutional reasoning is not meant to suggest that the best way to reason about the constitutional text should harken back to the specific intentions or views of the framers. Indeed, it is possible to come up with solutions to problems that would have been anathema to the founders but actually advance the aims they sought to achieve (as perhaps demonstrated by the reference to *Blaisdell* in the above explication). For example, the framers were adamantly opposed to political parties and consistently warned Americans against the dangers of party spirit.[68] As James Ceaser has argued, however, political parties, as theorized and developed by Martin Van Buren, did a better job during the 19th Century of controlling demagoguery — which the framers believed posed one of the greatest dangers to constitutional democracies — than the elaborate electoral design intended to do so. Strong political parties based on consistent programmatic appeals to the people thus restrained personal ambition in the service of the party insofar as political success required loyalty over time to the party's platform.[69] The party system as theorized by Van Buren, therefore, can be seen as a more constitutional way of controlling demagoguery than the original electoral design, despite the framers purported views regarding the inefficacy of parties.

[68] See George Washington Farewell Address.
[69] James W. Ceaser, *Presidential Selection* (Princeton, NJ: Princeton University Press, 1979).

To reason constitutionally, as this dissertation uses the term, is thus to make principled arguments about how an action or a proposed use of power is in service of the larger purposes of the constitutional order. When it comes to interbranch disputes, these arguments are not issued as bright-line rules from the judiciary, but are subject to political contestation and public evaluation. At times, this dissertation relies on arguments from *The Federalist* to explain the purposes of shared powers — such as in the case of the Senate's involvement in treaty ratification and the underlying purposes signified by that particular design choice. *The Federalist*, of course, is not necessarily representative of the views of the drafters of the Constitution in an originalist sense. Even so, it is perhaps the best account of the type of constitutional reasoning appropriate to the constitutional enterprise insofar as it attempted to give the best reasons for the specific design choices and how such design choices are reflective of positive goods. At other times, this dissertation — as in the recess appointments case study — points to what could have been a valid constitutional argument advanced by a branch, even as the particular interaction under study took on an overly legalistic frame given judicial interference in the contestation. In that sense, this dissertation is prescriptive of a type of political contestation. Finally, there are times when the branches do not engage the constitutional text per se, but are induced to reason about the purposes undergirding their institution and adapt mechanisms that advance both the aims of the constitutional order while also preserving the purposes of the institution in the first place — as in the development of the legislative veto. The needs of government and the ambition of officeholders (in the Madisonian sense) guide the debate as the branches negotiate their

boundaries in politics. The point here is that insofar as the Constitution's institutional structures and its assignments of power are means to ends, the branches should reason about constitutional purposes in their interactions, this reasoning guided by and constrained by their legal powers, but not reducible to specific textual instantiations of their powers. The examples this dissertation uses at times are not legalistic standards but are meant to be reflective of a way of thinking about the Constitution (whether self-consciously or not) that seeks to advance its aims in politics rather than to allow a letter-of-the-law understanding of the Constitution undermine it.

CASE STUDY OVERVIEW

The burden of this dissertation is borne by three case studies. Ultimately, the veracity of the claim that an overly legalistic notion of the Constitution's assignments of power cannot capture the capaciousness of (and indeed can subvert) constitutional politics is more easily shown through an examination of case studies than by theoretical explication. The purpose of the case studies is not to prove that the separation of powers system is understood too legalistically in an empirical sense, but to show how to think politically about the Constitution in different contexts and how narrowly legalistic reasoning about the Constitution's assignments of power can undermine constitutional purposes. Insofar as the aim of this dissertation is to analyze higher order principles in separation of powers disputes, there are any number of potential case studies that could serve to illuminate the core issues of the dissertation.

This dissertation will examine three cases: the legislative veto, executive agreements, and recess appointments. The cases thus cover three major issues of governance — delegation and lawmaking, foreign affairs and international agreements, and the modern appointments process — and are, therefore, reflective of a broad array of constitutional concerns. The case studies, moreover, are also fairly representative of different types of interbranch conflict. The legislative veto case study is about judicial intervention into, and disruption of, a working relationship between the branches based on several decades of constitutional practice. The case study thus shows how the branches had adapted the lawmaking process to both achieve governmental aims — insofar as both branches agreed that delegation was necessary to do so — while ensuring the involvement of both branches, even if in an attenuated capacity. Judicial resolution based on a literal interpretation of the Presentment Clause, however, undermined the branches' working relationship, subverting the larger aims of separation of powers insofar as the Court sanctioned widespread delegation, thus allowing the concentration of legislative and executive power within the executive branch and the administrative state.

The executive agreements case study is about an issue where the judiciary has not intervened (given the foreign affairs context) and, therefore, provides some insight into how the branches negotiate their boundaries without the looming presence of the judiciary. Moreover, the executive agreements case study examines the extent to which constitutional practice largely reflects the kinds of constitutional concerns that the Treaty Clause points to even as practice, at least upon first glance, departs significantly from its literal terms. In other words, as executive agreements have largely displaced treaties,

constitutional practice largely reflects a principled division of labor insofar as there seems to be a qualitative difference between the types of agreements that are conducted as treaties versus executive agreements. While many legal scholars and practitioners treat the varying types of international agreements as completely legally interchangeable, constitutional practice reveals that such agreements are not politically interchangeable.

Finally, the recess appointments controversy presents perhaps the hardest case for the dissertation insofar as it argues that the Court should have refused to rule on the merits of the case in *Noel Canning* even though President Obama violated the clear and express terms of the Recess Appointments Clause by making recess appointments during pro forma Senate sessions. As will become clearer in the case study, the Court's intervention obscured the higher order commitment of the Clause to maintain governmental functions. This subverted the political dynamics by changing the terms of the debate. The branches were induced to argue about the technical meaning of recess rather than to engage, and to make arguments about, the particular circumstances that gave rise to the recess appointments in the first place.

These case studies, taken together, show how the constitutional text signals a hierarchy of values that are typically missed by focusing purely on the literal level of the law. Understanding the separation of powers as a dynamic political order instantiated by the Constitution thus reveals how the Constitution is adaptable to the various crises and exigencies of changing circumstances. The Constitution, however, could not be completely elastic and maintain its fundamental character. The limits to its elasticity, however, are better maintained through political negotiation by the branches, tethered to

legitimate constitutional claims deduced from, but not reducible too, the text. While enforcing the letter of the law seems to better maintain the Constitution's fundamental character, this dissertation demonstrates how a narrow focus on law can undermine rather than maintain the fundamental character of the constitutional order.

The Legal Undermining, and the Persistence, of Constitutional Politics: The Case of the Legislative Veto

INTRODUCTION

There is little doubt that the legislative veto was one of the most consequential constitutional innovations in the history of American government before it was invalidated by the Supreme Court in *INS v. Chadha* (1983) in one of the most sweeping judicial acts in American history. The legislative veto was a mechanism by which Congress delegated legislative power by statute to the executive branch or to bureaucratic agencies while retaining the ability to veto executive actions or proposed bureaucratic rules in particular instances. Congress used several variants of the legislative veto, including joint resolutions that required the president's signature (or veto). However, the most controversial legislative vetoes — the vetoes at issue in and invalidated by the Court in *Chadha* — were those that did not meet the Constitution's requirements for lawmaking (bicameralism and presentment). For example, Congress could pass a concurrent resolution of approval, thus requiring that both houses approve a proposed rule before it could go into effect. Alternatively, Congress could allow proposed rules to go into effect after a specified period of time (usually 60 days) unless one or both houses disapproved by passing either a simple or concurrent resolution of disapproval, respectively.

Legislative vetoes were first passed in appropriations acts dealing with executive re-organization in 1933, granting the President wide discretion and latitude to re-organize the executive branch by executive order unless Congress passed a resolution of disapproval within 60 days. Presidents, of course, lobbied for re-organization authority so

that such reorganizations would not be stymied by going through the full, and cumbersome, legislative process where such bills were often easily defeated. Congress, on the other hand, assuaged worries about congressional abdication by attaching legislative vetoes to this vast transfer of legislative power to the executive branch.

While the legislative veto was only used sporadically over the course of the next few decades, during the 1960s Congress began to use it frequently, especially as it increasingly delegated legislative power to the executive branch and to bureaucratic agencies. Legislative vetoes were included in a number of statutes that were part of the legislative response to fears of an "imperial presidency" during the Nixon era, including the War Powers Act of 1974, the Budget and Impoundment Act of 1974, the Federal Trade Act of 1974, among many others. During the 1970s Congress enacted 353 legislative veto provisions, an increase of more than 300 percent from the previous decade.[70] This increased use of the legislative veto makes sense given the vast increase in regulatory authority and rulemaking that occurred during the same time period. For example, from 1955-1960, Congress enacted 37 regulatory statutes compared to 119 passed by Congress between 1966 and 1975.[71] As bureaucratic rulemaking skyrocketed in the 1970s, many government reformers called for a generic legislative veto by which all agency regulations would be subject to some form of the legislative veto.

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[70] Michael J. Berry, *The Modern Legislative Veto: Macropolitical Conflict and the Legacy of Chadha* (University of Michigan Press, 2017), 8.

[71] Joseph Cooper, "The Legislative Veto in the 1980s," in *Congress Reconsidered*, ed. Lawrence C. Dodd and Bruce I. Oppenheimer, Third Edition (Washington, D.C: CQ Press, 1985), 377.

Given the expansion of the national government's prerogatives following the New Deal, and the huge growth of government in the decades after, supporters of the legislative veto viewed it as an essential mechanism for Congress to retain control of its delegated powers and ensure democratic accountability over the administrative state. Such delegation was regarded — as well as sanctioned and endorsed by the judiciary — as essential given the complexity of modern government and the vast array of issues that require national attention. Without such controls over delegation many contended that Congress commits "legiscide," surrendering democratic oversight by ceding power to unelected and unaccountable bureaucrats.[72] Others, however, viewed the increased use of the legislative veto as an assault on presidential power and an example of congressional overreach.[73]

The purpose of this chapter is to show that the legislative veto, while seemingly a departure from the literal strictures of the constitutional text, was actually an example of the dynamism of the Constitution's separation of powers, an attempt to realize the energy of the executive branch while balancing that efficiency with the aims of republican government.[74] That the legislative veto is a political invention meant to bring to bear separation of powers values on the problems of modern government is particularly

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[72] Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2d ed (New York: Norton, 1979).
[73] L. Gordon Crovitz and Jeremy A. Rabkin, eds., *The Fettered Presidency: Legal Constraints on the Executive Branch*, AEI Studies 485 (Washington, D.C: American Enterprise Institute for Public Policy Research, 1989); John R. Bolton, *The Legislative Veto: Unseparating the Powers*, Studies in Legal Policy 148 (Washington: American Enterprise Institute for Public Policy Research, 1977).
[74] Murray Dry, "The Congressional Veto and the Constitutional Separation of Powers," in *The Presidency in the Constitutional Order*, ed. Jeffrey K. Tulis and Joseph M. Bessette (Baton Rouge: Louisiana State University Press, 1981), 195–233.

evident given that the legislative veto merely alters the order of interbranch action without changing the substantive involvement of the two branches when it comes to lawmaking. In other words, the legislative veto — itself authorized by a statute passed by both houses of Congress and signed by the president — merely reverses the sequence of interbranch action, allowing the executive branch to engage in the lawmaking function reserved to Congress by the Constitution while ensuring that such rules (which are themselves legally binding on citizens) only go into effect so long as both houses of Congress agree. The first part of this chapter will trace the development of and rationale for the legislative veto in light of the need to delegate, noting, where relevant, how the legislative veto worked in varying policy contexts, such as executive re-organization, budgets and impoundments, foreign policy, and administrative rule-making. In short, this section will demonstrate how the legislative veto was an essential mechanism for bringing to bear the competing desiderata of American constitutionalism on the complex problems of modern government. This, of course, is not to say that the legislative veto is devoid of problems, as amply noted by many political science critics of the veto.[75] The benefits of the veto, I argue, outweigh the costs.

The Supreme Court, however, ruled the legislative veto unconstitutional in *INS v. Chadha* (1983), claiming it violated separation of powers doctrine. The Court's sweeping

[75] Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*, Princeton Studies in American Politics (Princeton, N.J: Princeton University Press, 1996); Barbara Hinkson Craig, *The Legislative Veto: Congressional Control of Regulation*, 2nd printing, Westview Replica Edition (Boulder, Colo: Westview Press, 1984); Harold H. Bruff and Ernest Gellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," *Harvard Law Review* 90, no. 7 (1977): 1369–1440.

decision thus invalidated over 300 laws — more laws in this one instance than in all other Supreme Court actions combined.[76] According to the Court, once Congress delegates to executive officials any subsequent action it takes to exercise control over those delegations must meet the constitutional requirements for legislation — including bicameralism and presentment — outlined in Article I, Section 7, Clause 2. While the Court conceded that the legislative veto is an efficient mechanism for adapting the government to modern circumstances, it was nevertheless struck down as an unconstitutional shortcut through the separation of powers framework because Congress acted in a non-legislative way, thus meddling in the administration of government.

The Court's decision in *Chadha*, however, was deeply problematic insofar as the Court attempted to make tidy categorizations about types of powers based solely on who wields those powers — i.e. when power is wielded by an executive official it is presumptively executive. In this way, the Court not only mischaracterized the fundamental nature of the constitutional design by overly emphasizing "parchment barrier" distinctions, but ultimately, as Justice White argued in his trenchant dissent, led to the very phenomenon the Court attempted to avoid with its formalistic reading of the Constitution: the concentration of legislative, executive, and judicial power in the same hands. Moreover, the scope of the Court's decision was particularly troubling given that the legislative veto at issue in *Chadha* differed substantially from other contexts in which Congress implemented the veto because the particular veto in *Chadha* dealt with quasi-

[76] Barbara Hinkson Craig, *Chadha: The Story of an Epic Constitutional Struggle* (New York: Oxford University Press, 1988).

judicial power in an adjudicatory setting rather than the wielding of Congress's delegated legislative power. In this light, then, the Court went well beyond the question at issue in the case, disrupting decades of interbranch negotiation and compromise.

Finally, this chapter will conclude by considering the impact of the Court's ruling on legislative vetoes. While Congress's ability to retain oversight of its delegated legislative power has been substantially curtailed — as evidenced by the failure of the Congressional Review Act's (CRA) joint resolution of disapproval mechanism — the legislative veto has survived in other forms.[77] Legislative veto surrogates, though not as powerful in a formal sense, operate much like the legislative vetoes invalidated by *Chadha*. The persistence of the legislative veto points to the vitality of the Constitution's political architecture.

THE PROBLEM (AND THE NECESSITY) OF DELEGATION

The legislative veto was invented as the size of the national government expanded. While several administrative departments were established during the founding era — the departments of state, war, and treasury — the growth of the modern administrative state began in the 1880s, following rapid changes in industrialization and urbanization. Moreover, the scope of the national government and the rise of the modern administrative state occurred with great rapidity during the 1930s as the national government responded to the unprecedented economic challenges during the Great Depression.

[77] Louis Fisher, "The Legislative Veto: Invalidated, It Survives," *Law and Contemporary Problems* 56, no. 4 (Autumn 1993): 273–92; Berry, *The Modern Legislative Veto*, 84–107.

Article I of the Constitution explicitly states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Even so, Congress found itself increasingly incapable of legislating effectively given the vast array of complex issues on the national agenda. The national government's role expanded into complex, and increasingly technical issues like transportation, communication, employment, wages and prices, labor relations, race relations, and the environment, among others. While Congress had been better equipped to handle the comparatively simple tasks of 19th Century government, it increasingly delegated broad legislative powers to the executive branch and to bureaucratic agencies.

Such delegation has not been without controversy. Throughout the 19th and into the 20th Century, the judiciary followed the common law maxim of *delegate potestas non potest delegari*. This was the idea, most prominently associated with John Locke, that the legislature cannot delegate away its power.[78] Central to the non-delegation doctrine is the idea that the lawmaking function cannot be delegated away from the legislature, which is the most representative and democratically-accountable body. In *Schechter Poultry Co. v. United States* (1935) — the last case in which the Court struck down a statute for excessive delegation — the Court stated that Congress can certainly delegate to others the responsibility for "the making of subordinate rules within prescribed limits," but the

[78] "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others…. And when the people have said, we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them." See, John Locke, *Two Treatises of Government*, ed. Peter Laslett, 2nd ed (London: Cambridge U.P, 1967), para. 141.

"necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[79] In other words, delegation of legislative power to the president or administrative agencies in ways that allows Congress to avoid choosing between political alternatives (as opposed to merely administrative or logistical options) subverts the constitutional design by leaving law-making authority in entities that are not electorally accountable or representative of the range of diverse interests in the general public.[80]

The commonly received narrative is that the non-delegation doctrine played a crucial role in American constitutional government before it was decidedly and dramatically repudiated at the end of the New Deal. There is substantial evidence, however, that this narrative is exaggerated. Even if delegation did not occur on the scale with which it has since the New Deal, legislative delegation of rulemaking and adjudicatory power to administrators was a central feature of the national government almost as soon as the Constitution was ratified in 1789.[81] This has perhaps been obscured by the fact, noted by Keith Whittington and Jason Iuliano, that the judiciary created a rhetoric/reality distinction in the 19th Century by coupling "strong judicial statements about the importance of the non-delegation principle" with "weak judicial enforcement of

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[79] Schechter Poultry Corp. v. United States, 295 US 495 (1935).
[80] Sotirios A. Barber, *The Constitution and the Delegation of Congressional Power* (Chicago: University of Chicago Press, 1975); Lowi, *The End of Liberalism*; David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven, Conn: Yale University Press, 1993).
[81] Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012).

the doctrine."[82] In the words of one constitutional commentator, the Court was able to have its "constitutional cake" and eat it too by upholding delegations of legislative power while at the same time declaring, "as hale and hearty as ever," that Congress cannot delegate its legislative power.[83]

The Court managed this by starting from the premise that legislative power cannot be delegated, while also acknowledging, as a minor premise, the necessity that some powers be delegated if Congress was to effectuate its will.[84] The Court, therefore, concluded in most instances that the powers delegated must not be legislative, but, rather, the mere "filling in of details" of a legislative scheme, or giving the president "fact-finding" power to determine if certain contingencies had taken place that would trigger a certain governmental response.[85] Such obfuscations by the Court, however, masked the extent to which Congress's delegated powers often involved substantial discretion to choose between policy alternatives that exceeded mere "fact finding" or the "filling in of details."[86] In short, the Court gave "lip service" to the non-delegation doctrine while at the same time "yielding to necessity" in light of the overwhelming need to delegate.[87] From this perspective, then, the two cases in which the Court enforced the non-delegation

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[82] Keith Whittington and Jason Iuliano, "The Myth of the Nondelegation Doctrine," *University of Pennsylvania Law Review* 165, no. 2 (January 1, 2017): 384.
[83] Robert E. Cushman, "Constitutional Status of the Independent Regulatory Commissions," *Cornell Law Quarterly* 24 (1939 1938): 27–28.
[84] Cushman, 28.
[85] Cushman, 28.
[86] Barber, *The Constitution and the Delegation of Congressional Power*, 52–72.
[87] Whittington and Iuliano, "The Myth of the Nondelegation Doctrine," 391; Walter Gellhorn, *Administrative Law: Cases and Comments*, University Casebook Series (Chicago: Foundation Press, 1940), 175. Gellhorn complained his influential law casebook that the Court's non-delegation cases had shown a "lack of logic," leading them to allow delegations even while upholding the non-delegation doctrine in their rhetorical pronouncements.

doctrine during the New Deal for excessive delegation of legislative power — *Schechter Poultry Corp v. US* (1935) and *Panama Refining Co. v. Ryan* (1935) — were mere exceptions to the Court's general acceptance of the need to delegate if Congress was going to see its legislative purposes achieved and implemented.[88]

Regardless, since the New Deal era widespread and open-ended delegations of legislative power have been an entrenched feature of the American constitutional order on a scale that is not likely to be dialed back.[89] While the Court today ostensibly requires that legislation have an "intelligible principle" that constrains the discretion of executive branch officials as they implement law in accordance with congressional will, the Court has yet to find a delegation that violates this standard — and this even as delegations have grown increasingly vague and open-ended, at times essentially transferring the legislative power of Congress *in toto* to the executive branch.[90]

From a practical perspective, of course, such delegations of legislative power are justifiable for a number of reasons, especially if the national government is to have the ability to deal effectively with issues of national concern.[91] First, given the number of

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[88] Whittington and Iuliano, "The Myth of the Nondelegation Doctrine."

[89] E. Donald Elliott, "Ins v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto," *The Supreme Court Review* 1983 (1983): 173–74. "It would be fatuous to believe that the courts are actually capable of declaring unconstitutional the vast administrative apparats that has developed during the fifty years since the New Deal, no matter how suspect its foundations may be in terms of existing legal doctrines."

[90] See Justice Antonin Scalia's dissent in *United States v. Mistretta* (1989), noting that the delegated powers were in all meaningful respects legislative rather than executive or administrative. ("It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation.").

[91] James M. Landis, *The Administrative Process*, Storrs Lectures on Jurisprudence 1938 (New Haven: Yale University Press, 1966); David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa: University of Alabama Press, 2000), 133–

issues on the legislative agenda Congress can delegate to alleviate its workload, prioritizing and focusing on issues it deems especially important. This is particularly important given the number of federal regulations that reach into nearly all facets of American life. In 2016, for example, the Federal Register included 3,853 final rules, taking up 38,652 pages, exceeding the previous record set in 2013 by 46 percent.[92] While page counts provide an imperfect assessment of the number of annual regulations, they do underscore the massive level of federal regulation that has existed for much of the past century, at an ever-increasing pace. Without the ability to delegate, the national government would clearly be unable to deal with all of the issues that it deems of national importance.

34; Jonathan H. Adler, "Placing Reins on Regulations: Assessing the Proposed Reins Act," *New York University Journal of Legislation and Public Policy* 16 (2013): 9–10.

[92] Clyde Wayne Crews, Jr., "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State" (Competitive Enterprise Institute, 2017), 3, https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf. When one includes all proposed rules — not just final rules — the page count for 2016 was 95,894.

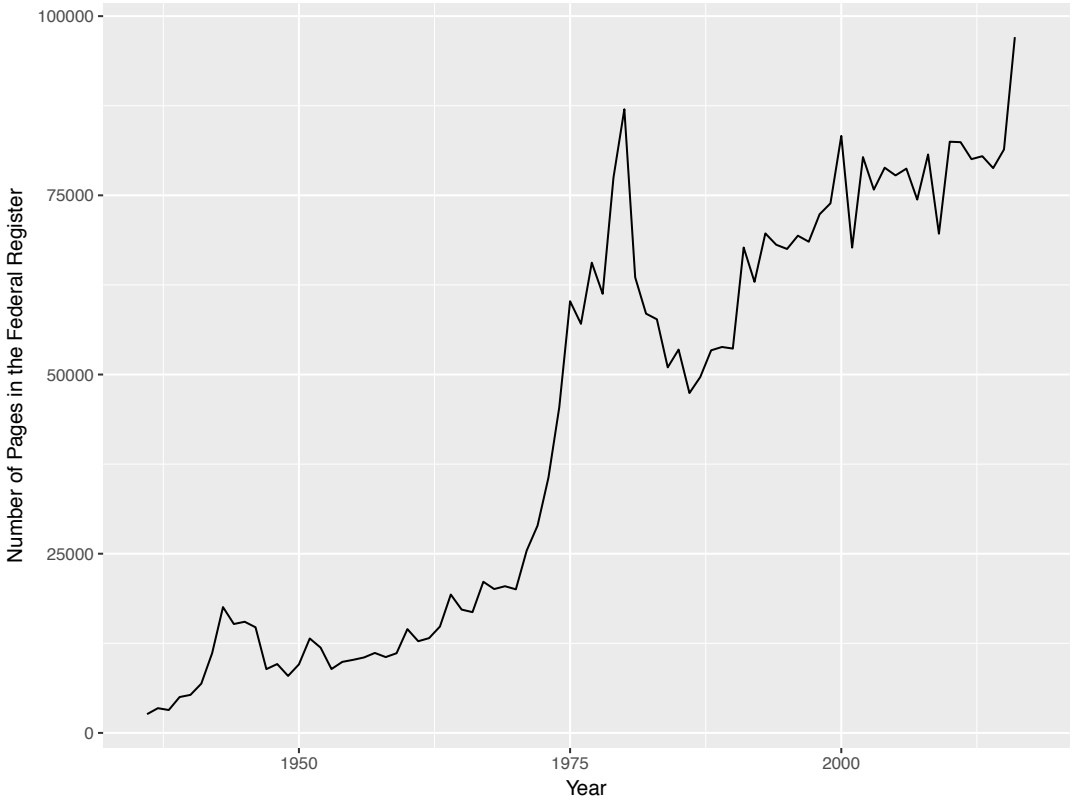

Table 1: Number of Pages in the Federal Register by Year[93]

Moreover, many issues require expertise that average legislators are unlikely to have, especially given the wide range of issues confronting Congress in the modern world. Hence, while Congress can legislate with general goals in mind, it is often best to leave the specifics to those with the appropriate training and expertise. For example, it is not hard to imagine the difficulty with which Congress would write, say, nuclear power plant safety regulations (and perhaps even less difficult to imagine why most citizens would not want Congress to undertake such a task!). Delegation to entities that have resources in both time and expertise, therefore, allows Congress to ensure that federal

[93] Data taken for this chart are from the Regulatory Studies Center at George Washington University

regulations are adapted well to the various nuances and contingencies of specific problems, a task that surely exceeds the capabilities of a deliberative body of generalists.[94] Finally, the hierarchical decision-making structures in the executive branch and in bureaucratic agencies often produce more efficient and deliberate outcomes than can a deliberative body organized around committees.[95] Indeed, vigorous executive leadership — for the sake of injecting energy into government — was one of the central achievements of the Constitution of 1787 after the lack of an independent and energetic executive branch had proved a colossal failure under the Articles of Confederation.[96]

However, even if legislative delegation to the executive branch and administrative agencies is a necessity for modern government on the scale with which it has existed during the past century — allowing the national government to deal with the wide range of technical issues that constitute the modern national agenda with the necessary flexibility and discretion — this does not necessarily entail that widespread delegation is an unqualified good, its benefits notwithstanding. In fact, delegation is deeply problematic from the perspective of democracy and public accountability, even if the judiciary found it nearly impossible (and completely impractical in light of modern demands) to enforce non-delegation as a judicial doctrine. If Congress has carte blanche authority to delegate its lawmaking power to other entities, then who ultimately bears

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[94] See, *Mistretta v. United States* (1989): ("[I]n our increasingly complex society, … Congress simply cannot do its job absent an ability to delegate power under broad general objectives.") Adler, "Placing Reins on Regulations," 9.
[95] Christopher DeMuth, "The Regulatory State," *National Affairs*, Summer 2012, 72.
[96] Louis Fisher, "The Efficiency Side of Separated Powers," *Journal of American Studies* 5, no. 2 (1971): 113–31.

responsibility for the laws that citizens live under, and what control do citizens have over the government instituted in their name?

Delegation can thus be contrary to constitutional structure by writing Congress — the most democratically-accountable and diverse governmental body — out of the lawmaking process, leaving the lawmaking function in the hands of unelected and unaccountable administrators.[97] There are clear benefits to delegating to an expert administration for the sake of addressing particular policy questions with efficiency and specificity. Even so, expertise is no substitute for the political choices that a self-governing community must make. In other words, there is not necessarily a "correct" answer to many public policy questions that an expert administrator will be able to produce outside of the political process.[98] Nearly all of the questions of political life are certainly aided by expertise, but expertise is no substitute for the balancing of various commitments and political trade-offs that are central to government run by popular opinion.

For example, vague congressional mandates to the EPA to issue regulations that ensure "clean air" (which assuredly a vast majority of Americans think is something worth having) do not answer the question of how to balance the need for clean air with, say, ensuring that businesses are not overly burdened by regulations in order to ensure

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[97] Cass R. Sunstein, "Constitutionalism after the New Deal," *Harvard Law Review* 101, no. 2 (1987): 446–47. ("[T]he New Deal … measures have not produced a system that even remotely resembles the constitutional system of checks and balances …. [A]gency actors lack electoral accountability and often are not responsive to the public as a whole.").

[98] Wendy E. Wagner, "The Science Charade in Toxic Risk Regulation," *Columbia Law Review* 95, no. 7 (1995): 1613–1723; Roger A. Pielke, *The Honest Broker: Making Sense of Science in Policy and Politics* (Cambridge: Cambridge University Press, 2007).

that unemployment rates stay low (also no doubt supported by a majority of Americans). As Russell Muirhead argues, the good of democratic government is not reducible to "getting things right." Rather, democracy is ultimately about "making things right."[99] In other words, the good of democratic government is, in many respects, procedural, providing a space in which people can regularly adjudicate their competing claims and then to enact laws in accordance with the deliberative will of the majority. However, if the various political choices and trade-offs that constitute democratic life are not clear, then citizens will have a difficult time holding their government accountable and ensuring that laws and governmental policies reflect democratic demands.

Many critics of open-ended delegation note that these political choices are exactly what delegation obscures. Theodore Lowi famously argued in his highly-influential study on open-ended delegations that such delegations can result in governmental "impotence" in the face of democratic demands.[100] Because Congress often delegates with broad mandates that provide little, if any, guidance to administrators based on specific political decisions made by Congress, administrators thus have great freedom to make policy decisions that cater to the specific demands of the particular interest groups that are most impacted by regulations.[101] Hence governmental policy is not the result of an overarching congressional plan wherein political trade-offs are made in light of general governmental

[99] Russell Muirhead, "The Politics of Getting It Right," *Critical Review* 26, no. 1–2 (April 3, 2014): 115–28.
[100] Lowi, *The End of Liberalism*.
[101] Schoenbrod, *Power without Responsibility*, 86.

objectives. Rather, policy is made piecemeal in response to different interest groups across the bureaucracy.

Congress can take advantage of the obscurity created by delegation. If administrators are making choices rather than Congress, members of Congress can pass the blame onto those administrators, praising or criticizing particular governmental decisions based on the particular audience.[102] Jonathan Adler demonstrates how this phenomenon worked with the EPA's decision to begin regulating greenhouse gases under the Clean Air Act.[103] The Clean Air Act of 1970 (later amended in 1977 and 1990) authorized the EPA to regulate carbon emissions. During the Obama administration, however, the EPA began to extend its rulemaking to the regulation of greenhouse gases.[104] While the Court sanctioned the EPA's regulation of greenhouse gases under the Clean Air Act,[105] Congress never passed a statute directing the agency to do this.[106] In fact, the EPA acknowledged that to regulate greenhouse gases according to the same formula as carbon emissions would produce absurd results that would grind air pollution programs to a halt. Consequently, the EPA regulated greenhouse gases on an entirely new formula based on what it deemed to be reasonable absent congressional legislation on the matter.[107] The result, of course, is that a bureaucratic agency essentially made law that

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[102] Schoenbrod, 88–94.
[103] Adler, "Placing Reins on Regulations," 13–16; Jonathan H. Adler, "Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration," *Harvard Journal of Law and Public Policy; Cambridge* 34, no. 2 (Spring 2011): 421–52.
[104] Adler, "Heat Expands All Things."
[105] Massachusetts v. EPA (2006).
[106] The House of Representatives passed a bill in 2009 that would authorize the regulation of greenhouse gases, but no legislation on this matter ever reached the Senate floor.
[107] Adler, "Heat Expands All Things," 422; Adler, "Placing Reins on Regulations," 15.

affects millions of people without any public deliberation or political accountability by elected officials in Congress. It is even more notable, according to Adler, that members of both parties in Congress criticized the EPA for either being too lenient or too strict "as if the decision to regulate greenhouse gasses was the EPA's and the EPA's alone."[108]

From a constitutional perspective, then, delegation can only go so far before it undermines core constitutional values, leaving both the legislative and executive function in the same hands. While such delegation might secure the energy that, according to Hamilton, is essential to good government,[109] efficiency is only one constitutional value that must be held in tension with the need for public accountability. In other words, efficiency must be balanced with deliberation about the political choices and tradeoffs that any self-governing community must make.

THE LEGISLATIVE VETO AND CONSTITUTIONAL POLITICS

The legislative veto was a political tool invented to bring the competing desiderata of American constitutionalism — majoritarian will and energy — to bear on the problem of big government by allowing Congress to approve or disapprove certain rules, regulations, or executive actions.[110] What is important to note — and what should be clear from the previous section — is that the legislative veto was created in response to the fact of delegation of legislative power and the ways in which such delegation, without qualifications, can undermine core principles of separation of powers by placing

[108] Adler, "Placing Reins on Regulations," 15.
[109] Alexander Hamilton et al., *The Federalist Papers*, ed. Clinton Rossiter, 1 edition (New York, NY: Signet, 2003).
[110] Murray Dry, "The Congressional Veto and the Constitutional Separation of Powers."

the lawmaking function in entities other than Congress. While there is significant evidence to suggest that delegation occurred long before its general acceptance by the Court during the New Deal — suggesting the practical impossibility of non-delegation given the demands of modern life — by the middle of the 20th Century such delegation was sanctioned by the judiciary and since that time has been a firmly entrenched feature of the constitutional order. As Congressman Elliott Levitas (D-GA), a primary advocate of the legislative veto put it:

> If you ask the man on the street who makes the laws in this country, he would likely tell you that Congress does. But he would be wrong, because more edicts regulating his life are promulgated by unelected bureaucrats than are passed by the elected Congress.[111]

According to Levitas, the legislative veto was a mechanism meant to restore the political architecture of the Constitution by giving "the public, through their elected representatives, an input into and a control over the rules which govern their lives."[112] That Congress viewed the legislative veto as an essential mechanism to restore the Constitution's political architecture is evidenced by the increasing use of the legislative veto in all kinds of issue areas, including executive reorganization, budgets and impoundments, and bureaucratic rulemaking through the 1970s before *Chadha*.

[111] 129 Cong. Rec. H931-43 (daily ed., March 8, 1983) (Statement of Rep. Levitas).
[112] Ibid.

Types of Legislative Vetoes	Explanation
Concurrent Resolution of Approval	Regulations only go into effect if both houses vote to approve
Concurrent Resolution of Disapproval	Regulations go into effect (usually after 60 days) unless both houses vote to disapprove
Simple Resolution of Disapproval	Regulations go into effect (usually after 60 days) unless one house votes to disapprove
Committee approval or disapproval	Regulations go into effect based on committee approval or disapproval

Table 2: Types of Legislative Vetoes

What must be noted first is that legislative vetoes were included in laws passed by both houses of Congress and signed by the president. Legislative vetoes were thus part of a political arrangement between the two branches whereby Congress agreed to delegate its legislative power to the executive branch (or to independent agencies) while reserving the right to approve or disapprove specific exercises of that *legislative* power.[113] Often presidents asked for this power, and Congress at times only begrudgingly acquiesced to presidential requests for delegated authority. Congress attached legislative vetoes to its delegations of legislative power, recognizing both the need for delegation and the importance of reconciling such delegations with Congress's constitutional role as the nation's lawmaker. Insofar as presidents opposed the inclusion of legislative vetoes in

[113] Joint resolutions are resolutions that are passed by both houses of Congress and presented to the president for his signature or veto. At issue here are concurrent and simple resolutions, which are resolutions that do not require the president's signature and, consequently, cannot be vetoed by him.

statutes (as one would expect), Congress could always refuse to delegate in the first place. Both branches often had good reason to compromise.

For example, legislative vetoes were first included in laws granting the president the power to reorganize the executive branch by executive order rather than having to wait for Congress to legislate such plans. The legislative process is cumbersome and slow, and competing congressional pressures and compromises often stymie reorganization efforts rather than ensure that such reorganization efforts actually realize the overarching goal of efficient administration of the government. Such plans, therefore, are ultimately difficult to pass legislatively because opponents of the plan — perhaps agencies that will be discontinued or consolidated — can use all of the procedural mechanisms and hurdles of the legislative process to ensure defeat of a bill.

When Congress debated whether to grant reorganization authority to President Roosevelt in 1938, one vocal senator at the time went so far as to say that the reorganization powers requested by President Roosevelt would result in "an absolute dictatorship," while another said that such grants of power to the president meant that "pretty soon, there will not be any use for Congress," and that lawmakers "might just as well stay at home and endorse Executive directives by mail."[114] When Congress finally granted the president re-organization authority in 1939, it only agreed to delegate power

[114] Richard Polenberg, *Reorganizing Roosevelt's Government: The Controversy Overexecutive Reorganization, 1936-1939* (Cambridge: Harvard University Press, 1966), 129, 166.

by also attaching a legislative veto provision. Reorganization plans automatically went into effect after 60 days unless Congress passed a concurrent resolution of disapproval.[115]

The benefits of this political arrangement are clear. Granting the president legislative authority to reorganize the executive branch subject to a legislative veto allows the executive branch to craft a coherent plan in an efficient manner, and opponents of the plan have to convince a majority in both chambers to oppose the plan rather than just a majority in one chamber. While the balance of power is shifted greatly to the executive branch, Congress still maintains a deliberative role and can prevent reorganization plans with which it disagrees, as it did several times during the Truman administration when it vetoed the creation of several proposed executive agencies. Moreover, Congress's veto power gives it negotiating leverage — much like the president's veto power in a normal legislative process — to ensure that plans reflect Congress's own set of priorities. All in all, 102 executive reorganization plans were submitted to Congress from 1939 until *Chadha*; Congress disapproved 19 of them, demonstrating that Congress still had the final say even as it offered the president a more efficient alternative to the normal lawmaking process.[116]

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[115] Subsequent reorganization authorizations in later years used different variations of the legislative veto that shifted the balance between the two branches. For example, at times plans went into effect unless one house passed a resolution of disapproval.

[116] Congress stopped granting the president reorganization authority after the Court's invalidation of the legislative veto in *Chadha*. Since that time Congress has rarely undertaken the task of reorganizing the executive branch. Moreover, when Congress has acted in this regard it has generally acted in response to major crises instead of acting proactively. For example, Congress established the Department of Homeland Security after 9/11. Similarly, Congress established the Consumer Financial Protection Bureau *after* the economic crisis of 2008. Even so, much congressional action in this regard has been to add to the existing administrative apparatus rather than to reorganize or streamline. This, of course, further suggests the difficulty with which Congress can accomplish this important task without delegation. See: John W. York

The budget impoundment controversy during the Nixon administration similarly illuminates the logic of the legislative veto and how it was a vital component of healthy interbranch politics. Presidents since George Washington routinely impounded (or delayed the spending of) appropriated funds based on executive discretion, and this discretion makes sense given that changes in conditions on the ground might require adjustments to the actual spending of appropriated funds in ways not anticipated by Congress when it originally legislated. President Nixon, however, refused to spend money appropriated by Congress at an unprecedented level, at times attempting to change the policy choices made by Congress by refusing to spend money for certain programs that he disliked.[117] While President Nixon's motives were based on his policy disagreements, he translated his political motives into a sophisticated constitutional argument about the inability of Congress to develop coherent policy oriented to the *national* good because it was too beholden to parochial interests to make difficult decisions about budget cuts, continually increasing spending to satisfy various constituency groups. On the other hand, the president looked out for the national interest and, therefore, needed the ability to impound funds when Congress did not make difficult choices.

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and Rachel Greszler, "A Model for Executive Reorganization" (The Heritage Foundation, November 3, 2017), 2, https://www.heritage.org/political-process/report/model-executive-reorganization.

[117] Louis Fisher, *Congressional Abdication on War and Spending*, 1st ed, Joseph V. Hughes, Jr., and Holly O. Hughes Series in the Presidency and Leadership Studies, no. 7 (College Station: Texas A&M University Press, 2000), 115–27; Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass: Harvard University Press, 1999), 162–73.

Of course, from a legal perspective, the president either has the power to refuse to spend appropriated funds or he does not have that power. Even so, Congress responded to the president in the realm of politics, acknowledging the veracity of President Nixon's constitutional argument by admitting its own difficulties in crafting a coherent budget directed to the national good (especially since at the time the budgeting process was largely decentralized with overlapping jurisdiction among several committees), and recognizing both the legitimacy of the president's superior budget resources and national perspective. Hence, Congress passed the Budget Control and Impoundment Act of 1974, formally granting the president the power to impound or even to permanently refuse to spend appropriated funds subject to a legislative veto. In addition, Congress centralized its budgeting process and created the Congressional Budget Office (CBO) to give itself a national perspective on the national budget comparable to the Office of Management and Budget (OMB) in the White House. In short, the legislative veto mechanism was central to the political conflict over budget issues, giving the president the power to refuse to spend moneys appropriated by Congress (and to make arguments defending executive branch judgments) while ultimately ensuring that the most popularly accountable branch of government — tasked with constituting the national interest and its concomitant budget goals through its public deliberations — retained oversight over the national budget. The president's position as chief executive officer might give him a certain national perspective at odds with Congress, but their differences on particular issues ultimately have to be adjudicated through interbranch conflict, and the legislative veto

proved a crucial element of this interbranch negotiation by de-escalating the legal battle and moving political questions back to the realm of politics.

As these two examples demonstrate, the legislative veto was a mechanism Congress used to ensure that, in delegating legislative power to outside entities, it did not abdicate its constitutional responsibilities to enact laws in accordance with the deliberative public will. Indeed, given the bending of constitutional structure with regard to delegation of legislative power from Congress to the executive branch, Edward S. Corwin explained the basic constitutional rationale for the legislative veto as follows:

> It is generally agreed that Congress, being free not to delegate, is free to do so on certain stipulated conditions, as, for example, that the delegation shall terminate by a certain date or on the occurrence of a specified event; the end of a war, for instance. Why then, should not one condition be that the delegation shall continue only as long as the two houses are of opinion that it is working beneficially? As we have seen, moreover, it is generally agreed that the maxim that the legislature may not *delegate* its powers signifies at the very least that the legislature may not *abdicate* its power. Yet how, in view of the scope that legislative delegations take nowadays, is the line between *delegation* and *abdication* to be maintained? Only, I urge, by rendering the delegated powers recoverable without the consent of the delegate.[118]

Yet, even if the utility of the legislative veto is manifest in these examples — as well as in areas such as bureaucratic rulemaking, as discussed in the previous section — the question becomes whether the legislative veto violates the stipulation in Article I, Section 7, Clause 2 which requires that

> Every order, resolution, or vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of

[118] Edward S. Corwin, *The President, Office and Powers* (New York: New York University Press, 1940), 130.

> adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

This Clause suggests, at least ostensibly, that any action taken by Congress must meet the requirements for presentment to the president for his signature or veto, as well as bicameralism. However, the way the legislative veto worked in actual practice provides compelling evidence that the legislative veto fulfills the spirit of this Clause even if it contravenes the literal letter of the law. The veto power, as Hamilton expressed in *Federalist* 72, is important both for protecting the president from unconstitutional congressional encroachments upon his constitutional prerogatives and to give the president the ability to press his different political views vis-à-vis the Congress. The president's veto power, therefore, is a primary mechanism by which interbranch conflict occurs.[119] By analyzing the records of the Constitutional Convention, however, it becomes clear that this further stipulation that "[e]very order, resolution, or vote" that requires the consent of both houses must be presented to the president was an answer to Madison's concern that the Congress would attempt to circumvent the president's veto power by using semantic distinctions (like "orders," "resolutions," or "votes") to pass what, in actuality, are *bills* in order to circumvent the president's veto.[120]

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[119] Matthew N. Beckmann, *Pushing the Agenda: Presidential Leadership in U.S. Lawmaking, 1953-2004* (Cambridge: Cambridge University Press, 2010); Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998).

[120] James Madison reportedly argued that "If the negative of the President was confined to *bills*, it would be evaded by acts under the form and name of Resolutions, votes &c." (emphasis in original). United States and Max Farrand, eds., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1923), 301; Murray Dry, "The Congressional Veto and the Constitutional Separation of Powers,"

If legislative vetoes, as already indicated, are part of political arrangements — established by statutes — that merely reverse the sequence of interbranch action without changing the major substantive involvement of the branches, then this concern is unwarranted. In other words, such statutes greatly empower the president (or subordinate executive officials), vesting the executive branch with the power to propose regulations or subsidiary laws pursuant to its authorizing legislation. The legislative veto merely ensures that such laws only go into effect if Congress assents to them. The veto power, therefore, is not implicated because legislative proposals come directly from the executive.[121] Presumably the president would not veto his own legislative proposals. This was the position taken by Griffin Bell, Attorney General for President Jimmy Carter, regarding executive reorganization. Such proposals were constitutional, according to Bell, because reorganization statutes permit the president to "submit to Congress only those plans which he approves."[122] While Bell distinguished executive reorganization vetoes from other types of legislative vetoes, executive control, however, would seemingly extend to legislative vetoes more generally.

For example, presidential control extends to bureaucratic rulemaking as well — even if such rulemaking is not directly handled by the president or members of the Executive Office of the President in the White House — because the president has

205; Jacob K. Javits and Gary J. Klein, "Congressional Oversight and the Legislative Veto: A Constitutional Analysis," *New York University Law Review* 52 (1977): 480.

[121] Javits and Klein, "Congressional Oversight and the Legislative Veto."

[122] Letter of the attorney general to the president, in response to an inquiry on the constitutionality of section 906(a) of the executive reorganization statute, 5 U.S. Code, Sect. 901*ff*.: 43 Opins. A.G. 10 (1977) *quoted in* Murray Dry, "The Congressional Veto and the Constitutional Separation of Powers," 209.

political control of the bureaucracy through his power to appoint (with advice and consent) and fire subordinates within the executive branch at pleasure. The Constitution also gives the president the power to request "the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices."[123] This, as Javits and Klein argued, allows the President to require that any proposed policy action or subsidiary law be submitted to the president before prior review.[124] In fact, before the Court invalidated the legislative veto in *Chadha*, the executive branch required that all proposed final rules be submitted to the Office of Management and Budget (OMB) for review and approval before they were transmitted to Congress for its approval or disapproval.[125] Since that time, executive control over bureaucratic rulemaking has increased.[126] Hence, it is unlikely, to say the least, that presidents or their subordinates will allow rules to be submitted to Congress to approve or disapprove, with which they disagree. While the president certainly cannot micromanage all aspects of the bureaucracy, the potential for control is certainly there. Moreover, the president can train his attention on issues that are particularly important for the administration.

While some have contended that legislative vetoes are problematic in the case of Independent Regulatory Commissions because such commissions are politically insulated

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[123] U.S. Constitution, Article II, Section 2, Clause 1.
[124] Javits and Klein, "Congressional Oversight and the Legislative Veto," 487.
[125] Javits and Klein, 487–90.
[126] Steven Croley, "White House Review of Agency Rulemaking: An Empirical Investigation," *University of Chicago Law Review* 70 (2003): 821–86; Elena Kagan, "Presidential Administration," *Harvard Law Review* 114, no. 8 (2001): 2245–2385.

from the president (and, consequently, the president does not have the same kind of control over the substance of rules and regulations proposed),[127] this view is unpersuasive. Insofar as such commissions engage in rulemaking — which is in all its essentials substantive lawmaking — then it makes sense that Congress would use legislative vetoes to ensure that regulations emanating from these independent agencies reflect congressional intent. To disallow legislative vetoes in this instance would allow independent agencies to issue rules and regulations without *any* political oversight, even to ensure that such regulations ultimately accord with congressional mandates in the first place.

In addition to this, legislative vetoes are not instances of substantive legislation because Congress is merely approving or disapproving — without amendment — specific rules or regulations issued by those wielding the legislative power delegated by Congress.[128] If, on the other hand, Congress were to add amendments to legislative vetoes that altered the substance of the proposal coming from the executive branch, then those amendments would amount to substantive legislation that would require bicameralism and presentment. This, however, is not how legislative vetoes were designed or how they were used by Congress in practice. Hence, congressional invalidation of a proposed administrative action merely maintains the status quo. If Congress vetoes a proposed regulation before it goes into effect, the executive branch goes back to the drawing board and submits another rule. Similarly, if only one house votes to approve without

[127] Javits and Klein, "Congressional Oversight and the Legislative Veto," 490.
[128] Javits and Klein, 486.

agreement from the other chamber, this just means that both Houses do not agree to the legislation in question, and so it does not go into effect.

Finally, because legislative vetoes were not themselves acts of substantive legislation, bicameralism does not pose any major problems. In fact, the different veto mechanisms (one house versus two houses) provide the national government with flexibility to address political questions between the branches appropriately.

Table 3 shows the various types of veto provisions used by Congress prior to the legislative veto's invalidation in *Chadha*. A few things are worth noting. First, the vast majority of legislative vetoes that take place using chamber resolutions adhered to the general constitutional principle of bicameralism. Concurrent resolutions of disapproval are the only veto mechanism in which rules, regulations or administrative actions go into effect even if one of the two chambers disapproves (provided that the other house *does* approve). Murray Dry, however, notes that such arrangements were often beneficial to interbranch politics, adapting the power relationship between the branches in ways reflective of the type of political dispute at issue.[129]

[129] Murray Dry, "The Congressional Veto and the Constitutional Separation of Powers," 212–13.

Type of Veto	1932-1983
Concurrent Resolution of Disapproval	64
Concurrent Resolution of Approval	36
Simple Resolution of Disapproval	103
Simple Resolution of Approval	0
Committee Disapproval by both houses	2
Committee Disapproval by either house	12
Committee Approval by both houses	102
Committee Approval by either house	2

Table 3: Veto Provisions Classified by Form, Pre-*Chadha*[130]

For example, the Budget and Impoundment Act of 1974 included two different types of vetoes for each of the ways that presidents might refuse to spend funds (deferrals versus rescissions). For deferrals (wherein the president merely postpones the spending of appropriated funds), the president had to issue a report to Congress explaining the reasons for the deferral. The funds had to be made available for their stated purpose, however, if either house passed an "impoundment resolution" disapproving the proposed deferral. For rescissions (wherein the president refuses to spend certain appropriated funds permanently), such appropriations had to be spent as Congress originally legislated unless Congress passed a concurrent resolution of approval. In short, the legislative veto mechanisms in this instance were set up such that the burden of proof rested with the president when he proposed permanent alterations to the budget passed by Congress

[130] Garcia, Rogelio and Clark Norton. 1984. "Congressional Veto Legislation in the 98th Congress." Washington D.C.: Congressional Research Service. 4-19.

whereas the burden of proof rested with Congress when the president merely tried to use discretion for *when* such funds should be spent.

Similarly, the Arms Export Control Act put the burden of proof on Congress to disallow the sale of arms to foreign countries by a concurrent resolution of disapproval within 30 days of receiving notice of the pending sale. While this violates the principle of bicameralism (because the sale could go through if the two chambers disagree), Congress determined that this particular issue area required greater deference to presidential judgment. Hence, Congress adapted the legislative veto with a great degree of flexibility and attentiveness to the particularities of specific issue areas, departing from the principle of bicameralism when the issue area necessitated more deference to executive branch judgment.[131]

This still raises the issue of committee vetoes, which were (and, as will be explained later, still are) the most dramatic departure from the principle of bicameralism. Such vetoes, however, are merely reflective of the way Congress divides its workload. Generally speaking, committees have a great deal of influence over their area of jurisdiction relative to the rest of the chamber, and, therefore, have a great deal of freedom to shape policy. Committees are generally representative of the chamber as a whole both in terms of the partisan breakdown of the chamber as well as reflective of different geographies, etc. It is difficult to imagine a committee operating at odds to the rest of the chamber for a significant period of time without some sort of backlash from

[131] Murray Dry, 212–13.

the chamber. Reflecting the ways in which Congress operates, committees have a great deal of power in developing the legislation that makes it to the floor. Barbara Hinkson Craig, for example, who is particularly critical of legislative vetoes — and especially committee level vetoes — demonstrates that even when Congress merely inserts report and wait provisions into bills, committees have a great deal of leverage to effectively veto administration proposals.

In short, the legislative veto statutes merely reverse the sequence of interbranch action by delegating legislative power to the executive branch while retaining the right to approve or disapprove specific proposals. While the sequence with which the branches act has changed, the branches still perform the same *substantive* roles when it comes to the enactment of law in ways that bring their institutional advantages vis-à-vis each other — with regard to the competing desiderata of the constitutional order — to the fore. The president and his subordinates in bureaucratic agencies are granted vast amounts of power and discretion to make law for the sake of efficiency and the need for expertise, power that they would not ordinarily have absent congressional delegation. Such delegation, as previously argued, is greatly beneficial for harnessing the efficiency and expertise of the administration. Such delegation, however, is also deeply problematic from the perspective of democratic government. The legislative veto, therefore, is the mechanism by which the national government harnesses the benefits that come with delegation while ensuring that the most democratically accountable branch of government maintains its status as lawmaker by reserving the right to veto exercises of its delegated power. While the need for energy in government often requires delegation

given the scope and complexity of national concerns and issues, the need for responsiveness to the public will in a constitutional democracy, on the other hand, requires that Congress take responsibility for the laws that bind its citizens.

From this perspective then, the larger purposes of the separation of powers, far from being undermined by the legislative veto, are actually realized by it. Insofar as separation of powers is ultimately meant to ensure competing perspectives on political questions through interbranch contestation — realizing the aims of having an effective and efficient government with the prerogatives of a government run on popular opinion — the legislative veto is a modern adaptation that ensures these competing perspectives.

CHADHA AND THE LEGAL UNDERMINING OF CONSTITUTIONAL POLITICS

The legislative veto was a working political arrangement agreed upon by the political branches for several decades. This arrangement greatly empowered the executive branch by delegating to it lawmaking power — to secure the benefits of efficiency and expertise — while ensuring that the laws that govern citizens were only made in accordance with the deliberative will of the people expressed through Congress. The legislative veto, therefore, merely reversed the order of interbranch action while retaining the *substantive* political involvement of the two branches.

The Supreme Court, however, invalidated the legislative veto in *INS v. Chadha* (1983) for its failure to abide by the Constitution's requirements for legislation: bicameralism and presentment. Writing for the Court, Chief Justice Warren Burger declared that while the legislative veto was clearly a useful and efficient tool for

congressional oversight of the executive branch, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[132] The Court went on to assert that "convenience and efficiency are not the primary objectives — or the hallmarks — of democratic governance."[133]

Much can be said about the Court's decision in *Chadha*, but the discussion here will focus on two particular concerns. First, the Court's analysis stemmed from an overly-legalistic conception of separation of powers wherein the powers of government — legislative, executive, and judicial — are defined by their essences and then assigned to the appropriate branch. Starting from this premise, as I will demonstrate, led the Court to miss the actual facts on the ground, ignoring the reality of delegation and, consequently, giving the illusion that the legislative veto enabled an imperial and tyrannical Congress to usurp all the powers of government in contravention of basic separation of powers values. Far from vindicating separation of powers values, however, the Court's formalistic approach, perversely generated precisely what it purported to curtail: the concentration of legislative, executive, and judicial power in the executive branch.

The second issue concerns the sweeping nature of the Court's decision in *Chadha* and the Court's failure to distinguish between different classes of legislative vetoes. The type of legislative veto implicated in *Chadha* concerned whether a house of Congress

[132] INS v. Chadha, 462 US 919 (1983).
[133] INS v. Chadha, 462 US.

could pass a resolution overturning the Attorney General's decision that a resident alien should not be deported due to certain hardship issues. The legislative veto in question did not concern oversight of Congress's delegated powers, but, rather, dealt with a quasi-judicial hearing and, therefore, the protection of individual liberties from arbitrary governmental action. Hence, the Court's sweeping decision invalidated over 300 statutes and upset four decades worth of political negotiation between Congress and the executive branch when the actual issue of the case did not require that the Court reach the merits on all applications of the legislative veto.

The Court's Legalistic Premises

The Court characterized the legislative veto as a mechanism by which Congress stepped out of its legislative role to usurp executive functions in violation of the basic purposes of the separation of powers. The legislative veto, therefore, proved problematic because it empowered Congress vis-à-vis the executive branch, flying in the face of the framers' "profound conviction" that the powers of the legislative branch needed to be the "most carefully circumscribed" lest Congress dominate the constitutional system.[134] As the Court argued, the presentment and bicameralism clauses need to be preserved because they serve "essential constitutional functions" by safeguarding the president from

[134] INS v. Chadha, 462 US at 947, 951. The Court quoted James Madison in *Federalist* 51 (sloppily misattributing it to Alexander Hamilton) to demonstrate the framers' concern that the legislative branch would predominate without adequate constitutional safeguards: "In a republican government, the legislative authority necessarily predominates. The remedy for this is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."

Congress and protecting "the whole people from improvident laws."[135] As Justice White noted in his dissent, there is nothing wrong with the Court's "truismatic exposition of these clauses."[136] The presentment and bicameralism clauses are essential to the lawmaking function for all the reasons the Court cited in *The Federalist*.

The question, then, is why the Court viewed the legislative veto as *legislation* such that the constitutionally-prescribed mechanisms for legislation — presentment and bicameralism — applied. This is an especially important question given that the legislative veto — far from being an instance of congressional encroachment on executive prerogatives — was, in reality, a response to the need for congressional delegation of legislative authority to the executive branch. The legislative veto was a mechanism by which Congress retained its constitutional role, albeit in an attenuated sense, as it greatly expanded presidential power through delegation, transforming the president and executive subordinates into the nation's primary lawmakers. Congress could merely approve or disapprove substantive legislative proposals from the executive branch without amendment, thus ensuring that Congress's exercise of the legislative veto did not itself entail substantive legislation. In this way, legislative vetoes satisfied the

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[135] INS v. Chadha, 462 US at 948. The Court quoted Alexander Hamilton's discussion of the importance of the president's veto power in *Federalist* 73: "It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body…. The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design." Moreover, the Court quoted James Wilson who argued at the Constitutional Convention that dividing the legislative power into two distinct houses was ultimately an attempt to make it difficult for Congress to act. In a unicameral legislature, there are few checks to prevent arbitrary and unjust legislative action other than merely relying on the "virtue and good sense" of those who compose the legislature.

[136] INS v. Chadha, 462 US at 979. (White, J., Dissenting).

spirit, even if they violated its express letter, of Article I, Section 7, Clause 2's requirement that "[e]very Order, Resolution, or Vote" must be presented to the President because legislative proposals were issued from the executive branch, thus meaning that legislative vetoes did not, in any substantive way, avoid the president's veto power.

The Court's legalistic premises about the separation of powers, however, led it to mischaracterize the power dynamics between the branches, and, ultimately, to undermine the robust constitutional politics sustained by the legislative veto. Indeed, the Court asserted that the "Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility."[137] While not "'hermetically' sealed off from one another," the Court contended that when any branch acts it is "presumptively exercising the power the Constitution has delegated to it."[138] In other words, when an executive official acts, that action is presumptively "executive," and when Congress acts it acts in a presumptively legislative way. This, of course, is a problematic presumption given that in *Federalist* 37 Madison noted the difficulty of theoretically disentangling the different types of governmental power. Rather, the political science of the framers, as demonstrated at the outset of this dissertation, departed from the classical separation of powers' emphasis on powers, focusing instead on bringing to bear competing perspectives on politics by inducing conflict between differently structured institutions — hence, the mixing of

[137] INS v. Chadha, 462 US at 951.
[138] INS v. Chadha, 462 US at 951.

different types of power, such as the president's veto power (which is legislative in nature), and the Senate's role in treaty making (a power traditionally assigned solely to the executive branch). These examples of shared powers, moreover, are more than mere exceptions to a general principle of separation. On the contrary, they point to the complete transformation of separation of powers from legal doctrine to political architecture.

Beyond this problematic presumption, however, the Court concluded that the legislative veto must be characterized as an act of lawmaking for two additional reasons. First, the legislative veto was "essentially legislative in purpose and effect" because it altered the "legal rights" of citizens outside the legislative branch in ways that would not have occurred absent congressional use of the veto.[139] As Justice White observed in his dissent, however, this ignores the fact that when the executive branch wields legislative power delegated to it by Congress — such as in bureaucratic rulemaking — the exercise of this legislative power by executive officeholders alters the legal rights of citizens, and this action is accomplished without the constitutional safeguards of bicameralism and presentment. While the Court acknowledged this conundrum in a footnote, it brushed it aside by claiming that executive officials act in presumptively executive ways. "Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects," according to the Court, therefore, "is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does

[139] INS v. Chadha, 462 US at 952.

not so require."[140] In short, legislative power delegated to the executive branch becomes executive — i.e. non-legislative — based merely on the fact that such power is wielded by executive branch officials, and, therefore, is not subject to the Constitution's requirements for lawmaking.

Secondly, the Court asserted that the legislative veto had to be considered an act of lawmaking because there are only four constitutional provisions that allow one house of Congress to act outside of the legislative process.[141] But the question is not whether the Constitution specifically authorizes legislative vetoes, but whether Congress can enact a statute — following constitutional procedures — delegating legislative power subject to a legislative veto. If the legislative veto is derivative of a statute, then it does not matter that the Constitution does not explicitly provide for it. Since the early days of the republic the Court has recognized that the Necessary and Proper Clause implies powers not explicitly stated in the Constitution that enable Congress to effectuate its will. As Chief Justice John Marshall declared in *McCulloch v. Maryland*, "we must never forget that it is a Constitution we are expounding." As Marshall further explained:

> We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most

[140] INS v. Chadha, 462 US at 952, Fn 16.

[141] The House of Representatives alone was given the power to initiate impeachments (Art. I, Sec. 2, Cl. 2); The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial (Art. I, Sec. 3, Cl. 5); the Senate alone was given final unreviewable power to approve or disapprove presidential appointments (Art. II, Sec. 2, Cl. 2); and the Senate alone was given the unreviewable power to ratify treaties negotiated by the President (Art. II, Sec. 2, Cl. 2).

> beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.

In *Chadha*, the Court explained that the Necessary and Proper Clause does not give Congress the power to review exercises of its delegated power with a legislative veto because the legislative veto was not a "constitutionally permissible means" of implementing its power.[142] This, of course, begs the question, especially given that one of the reasons the Court asserted that the legislative veto was impermissible — and, therefore, could not be authorized by a statute under the Necessary and Proper Clause — was that the Constitution did not directly sanction this type of congressional action as one of the four ways in which Congress could act non-legislatively.

What is particularly peculiar about this, as Justice White pointed out in his dissent, is that the Court was inconsistent on the question of whether Congress has the power to enact veto statutes based on its authority under the Necessary and Proper Clause. In fact, the Court had long upheld actions similar to the legislative veto so long as those vetoes are exercised by non-governmental entities. For example, in *Currin v. Wallace* (1939), the Court upheld a statute that allowed certain restrictions on agriculture commodities to go into effect once a prescribed majority of affected farmers voted for it. Similarly, in *United States v. Rock Royal Cooperative* (1939) the Court upheld a statute which gave producers of certain commodities the right to veto marketing orders issued by the Secretary of Agriculture.[143] Hence, Congress could delegate legislative power subject

[142] INS v. Chadha, 462 US at 940–41.
[143] INS v. Chadha, 462 US at 2803.

to a veto from a specified interest group, but it could not reserve to *itself* the power to approve or disapprove exercises of its delegated legislative power. This discrepancy is telling. Evidently, the Court believed that the framers were so fearful of a powerful Congress that Congress cannot even modify its own powers in response to the modern fact of *executive-dominated government*.[144] According to the Court's logic, Congress can only act in a strictly legislative way and cannot take any action to oversee its delegated lawmaking functions outside of enacting a new statute. This, even as other entities are not subject to the same constraints for the mere fact that those entities are not Congress.

The Court's formalism gave the illusion that Congress was stepping outside its constitutionally-prescribed role in an attempt to encroach on executive prerogatives when, in fact, the legislative veto was a tool that allowed Congress to empower the executive branch to make law — so that the government could adequately address the myriad complex issues on the national agenda — while ultimately ensuring that laws governing citizens still retained the consent of Congress, the most broad-based, publicly accountable, and deliberative branch of government. The Court's failure to consider the legislative veto in light of delegation (in fact, the majority opinion does not mention delegation or the administrative state except in a passing footnote) kept it from recognizing that the legislative veto, far from undermining constitutional structure, incorporated basic separation of powers values into the practice of modern government.

[144] H. Lee Watson, "Congress Steps out: A Look at Congressional Control of the Executive," *California Law Review* 63, no. 4 (1975): 983–1094. Watson similarly argues that the framers were so fearful of an too-powerful Congress that Congress cannot act outside of enacting laws.

Hence, the Court's reasoning in *Chadha*, beyond its departure from the political science of *The Federalist*, also fails on its own formalistic terms. A strictly formalistic interpretation of separation of powers, as ostensibly advanced by the Court, would mean that Congress cannot delegate legislative power. It would seem to follow from the Court's legalistic premises that the Congress legislates, and that the executive branch administers the government. To be consistent, therefore, the Court should have revived the notion that Congress cannot delegate legislative power to the executive branch. Indeed, as Justice White wrote, the majority's holding represented "a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state."[145] Although some prominent commentators at the time worried that the Court's *Chadha* decision signaled a major shift in the Court's jurisprudence for just this reason,[146] the Court has yet to walk back its acceptance of widespread delegation.[147]

The Court's ruling in *Chadha*, therefore, ultimately and perversely undermined separation of powers values, notwithstanding Justice Burger's purported intentions to safeguard constitutional structure and to vindicate the Constitution's separation of powers. Categorizing delegated legislative power as executive solely because it is

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[145] INS v. Chadha, 462 US at 1002. (White, J., Dissenting).

[146] Laurence H. Tribe, "The Legislative Veto Decision: A Law by Any Other Name," *Harvard Journal on Legislation* 21 (1984): 17. "The Second, and more plausible, possibility is that *Chadha* represents only a transition to a more thoroughgoing repudiation of the constitutional upheaval that led to the approval, beginning in the mid-1930's, of the modern administrative state. Even if *Chadha* makes little sense against a backdrop of nearly limitless judicial tolerance for delegations of lawmaking authority to federal agencies and commissions, the decision would at least be of a piece with a significant judicial tightening of the limits within which Congress may entrust *anyone* with lawmaking power."

[147] See *Mistretta v. United States* (1989).

wielded by an executive branch official, and then narrowly defining the powers of Congress, actually frees the executive branch and bureaucratic agencies from separation of powers constraints such that they end up wielding legislative, executive, and judicial powers — the very definition of tyranny according to Madison.[148] In sum, Congress enacted legislative vetoes to adapt the Constitution's institutional framework to account for the problem of delegation. The Court's inconsistent and futile attempt to confine different types of power in the appropriate branch, on the other hand, led to the consolidation of power in the administrative state, unmoored from the political controls of the larger separation of powers framework.

Legislative versus Adjudicatory Legislative Vetoes

What is also deeply troubling about the Court's decision in *Chadha* is that it invalidated an entire class of legislative veto statutes based on a particularly problematic, and easily differentiated, legislative veto. Consequently, the Court irresponsibly issued a ruling far more sweeping than the case necessitated, disrupting a decades-long working relationship agreed to by both political branches. The particular veto at issue in *Chadha* concerned whether one house of Congress could pass a resolution overturning an order of the Attorney General to suspend a deportation over a finding of hardship.

Jagdish Rai Chadha was an immigrant from Kenya who lived in the United States on a student visa. Chadha was scheduled for deportation but requested that the

[148] Hamilton et al., *The Federalist Papers*, 298. Madison wrote in *Federalist* 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Immigration and Naturalization Service (INS) suspend his deportation because he met the statutory criteria for residence in the United States because of the hardship he would face if deported.[149] INS granted Chadha's request after a hearing, and, as required by law, reported to Congress the names of 339 other persons, along with Chadha's, who also had their deportations suspended for meeting the statutory criteria. Congress thus had the opportunity to exercise its veto to overturn any of the INS decisions it deemed improper. After reviewing the list, the House Committee on the Judiciary determined that six of those people, including Chadha, did not meet the statutory criteria, and it introduced a resolution to the House floor, stating that "the House of Representatives does not approve the granting of permanent residence in the United States to the aliens hereinafter named."[150] The House then passed the resolution without further explanation and without a recorded vote.[151]

The problem with this application of the legislative veto in the immigration context is that it was adjudicatory, dealing with and altering the legal rights of particular individuals, rather than serving as a mechanism by which Congress oversaw its delegated, and generally-applicable, legislative power. As Justice Powell argued in his

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[149] Craig, *Chadha*, 3–35; Berry, *The Modern Legislative Veto*, 61–65. After Kenya won its independence from Great Britain, it decided that those born in Kenya prior to independence would be granted citizenship unless their parents had immigrated to Kenya themselves. Chadha's parents were both immigrants. Children of immigrants, however, were entitled to apply for citizenship. Alternatively, many Kenyan Asians were also able to apply for passports from Great Britain because Kenya was a former colony. However, given the vast influx in applicants, Great Britain cracked down on immigration, setting new quotas. Chadha applied for a student visa and earned a degree in business administration from Bowling Green State University in Ohio in 1966 before going on to earn a master's degree in political science and economics in 1971. When Chadha's student visa expired, however, he faced deportation, but with no country or citizenship outside the United States.

[150] INS v. Chadha, 462 US at 963–64. (Powell, J., Concurring).

[151] INS v. Chadha, 462 US at 963–64. (Powell, J., Concurring).

concurring opinion, "[t]he House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria."[152] Hence, the House of Representatives (acting like an appellate court) took on functions generally reserved to the judiciary without providing any of the safeguards normally afforded to citizens in judicial contexts, such as the right to counsel and the right to a hearing before taking legal action. While noting the imperfect parallel, Justice Powell argued that the "effect on Chadha's personal rights would not have been different in principle had he been acquitted of a federal crime and thereafter found by one House of Congress to have been guilty."[153] Such trial by legislature, Justice Powell observed, is anathema to separation of powers values: "[The Bill of Attainder Clause], and the separation of powers doctrine generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."[154] Congress's job is to enact legislation that is generally applicable while leaving the adjudication of the rights of citizens in individual cases to those branches more appropriately structured to do so in ways that protect the rights of citizens from the whims and vicissitudes of the current political majority.[155]

Given the adjudicatory nature of the legislative veto at issue in *Chadha*, then, it is clearly easily distinguished from legislative vetoes as such. As Lawrence Tribe argued,

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[152] INS v. Chadha, 462 US at 964–65. (Powell, J., Concurring).
[153] INS v. Chadha, 462 US at 965, fn 8. (Powell, J., Concurring).
[154] INS v. Chadha, 462 US at 962. (Powell, J., Concurring).
[155] INS v. Chadha, 462 US at 967. (Powell, J., Concurring). Justice Powell quoted Chief Justice John Marshall: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments." *Fletcher v. Peck* (1810).

"if exercise of the legislative veto is objectionable because it amounts to a trial by legislature, that objection persists even if bicameral action and presentment to the President are assured."[156] In other words, Congress could not have overturned the decision of the INS and deported Chadha even by going through the full legislative process. The Court's holding with regard to Chadha (and other immigrants subject to deportation based on congressional action) was the right decision given that the application of law to specific individuals should only occur within adjudicatory settings that provide proper legal safeguards, safeguards that a legislature — even acting in its purely legislative capacity — does not provide. The Court erred, however, in failing to distinguish this particular congressional action from traditional forms of the legislative veto. The vast majority of legislative vetoes did not pertain to the application of law to specific individuals in adjudicatory settings, but, rather, were merely mechanisms by which Congress ensured that the generally-applicable laws that govern citizens retain the consent of their representatives in Congress.

Given this distinction, it is striking that the Court used *Chadha* as its vehicle to strike down all legislative vetoes, applying *Chadha* without comment in eight cases handed down the next month.[157] The Court did this in two ways. First, it misdiagnosed the actual problem in *Chadha* by failing to notice that no congressional action would have been constitutionally legitimate given the adjudicatory nature of the issue. Secondly, it elided the difference between the adjudicatory nature of that congressional action and

[156] Tribe, "The Legislative Veto Decision," 16.
[157] Berry, *The Modern Legislative Veto*, 73.

legislative vetoes enacted to oversee Congress's delegated legislative functions. The Court thus invalidated all legislative vetoes without having to substantively defend the expansiveness of its ruling.

The adjudicatory nature of congressional action in *Chadha* no doubt shaped the Court's perceptions about the problem of Congress altering legal rights, which, in the case at hand was deeply problematic. Such assumptions, however, do not easily translate, if at all, to the legislative context where rights are altered by executive officials wielding delegated legislative power (and, this, without the constitutional constraints of bicameralism and presentment). In *Chadha*, congressional action altered the legal rights of individuals in specific situations without the safeguards necessary for the protection of individual rights required in adjudicatory settings. In the legislative context, however, Congress used legislative vetoes to oversee the use of its delegated, and generally applicable, legislative powers. In this way, legislative vetoes employed in the legislative context protected individual rights by ensuring that laws made in the executive branch and in bureaucratic agencies were reflective of the public will. The Court's unnuanced and simplistic reasoning led it to miss this crucial and fundamental difference.

It is deeply unfortunate, therefore, that the Court invalidated over 300 laws (more laws struck down in one decision than in all other Supreme Court decisions combined!) without any consideration of how the differences between the specific issue in *Chadha* and legislative vetoes more generally might affect the constitutionality of legislative vetoes in differing contexts. At best, the Court's decision in Chadha was breathtakingly sloppy. At worst, the Court was looking for a pretext to invalidate all legislative vetoes

and used the particular veto in Chadha as a smokescreen, collapsing the issues to more easily indict all legislative vetoes. If the latter case, the sloppiness of the Court's reasoning disguised its indefensible activism. Either way, the Court went well beyond its constitutional role, policing the boundaries of the political branches and disrupting a working relationship meant to instill separation of powers values to the practice of modern government.

POLITICAL CRITICISMS OF THE LEGISLATIVE VETO

Even if the legislative veto was intended to be a positive invention that reconciles the inevitable need to delegate in the modern world with the larger political purposes of the separation of powers framework, this does not necessarily mean that the legislative veto performed this function well. This section, therefore, considers plausible objections to the legislative veto from within the political perspective of separation of powers articulated in this dissertation. While the critiques assessed here are plausible, they ultimately do not prove that the legislative veto undermines constitutional politics in the ways contended. Even so, such critiques provide useful criteria for assessing congressional use of the legislative veto.

The Effectiveness of the Legislative Veto Given the Scale of Delegation

The first critique is that the legislative veto was largely inconsequential and prevented Congress from using better institutional tools at its disposal. The most prominent proponent of this view is Jessica Korn who, in an award-winning book, contends that the legislative veto, rather than serving as a tool that fosters substantive

interbranch politics, merely gave the illusion of congressional power and engagement.[158] Korn argues that the veto was a Progressive Era shortcut through the separation of powers that allowed Congress to look powerful without actually mobilizing its institutional tools and capacities to engage in robust interbranch politics.[159] In Korn's account, legislative vetoes were inconsequential in practice, especially compared to other forms of legislative oversight. She develops her argument by examining case studies of policy areas before and after *Chadha* to show how, in her view, Congress actually performed its oversight functions better without the veto.

This critique certainly has merit in some issue contexts. Take, for example, the War Powers Resolution of 1973, an example that Korn, ironically, does not use. At the height of discontent over presidential war powers during the Vietnam Era, Congress passed the War Powers Resolution in order to "fulfill the intent of the framers of the Constitution," and to restore the constitutional balance between the branches with regard to the exercise of war authority by requiring that the United States only commit troops in the case of a "declaration of war," "statutory authorization," or in the case of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." In the absence of a formal declaration of war or statutory authorization,

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[158] Korn, *The Power of Separation*.

[159] Korn starts from the premise that the legislative veto — not the widespread delegation of modern government —was the real break with constitutional structure. The problem with this analysis is that it gets the history wrong. Delegation, not the veto, was the break with constitutional structure, and, as I previously demonstrated, was a part of constitutional practice long before the New Deal. The legislative veto, therefore, was an attempt to bring interbranch politics back in, albeit in a modified fashion, to ensure that congressional delegation did not amount to abdication. Even so, Korn's concerns regarding the politics the legislative veto fosters are well worth considering because she is ultimately concerned with the Constitution's political architecture and how well the branches perform their different political functions in the constitutional order.

the president was required to submit a formal report notifying Congress within 48 hours of committing troops abroad. This formal notification would open a 60-day window, after which the president was required to remove troops from hostilities unless Congress formally declared war or passed statutory authorization (or if Congress had not given the president a 30-day extension). Moreover, the Resolution provided a legislative veto mechanism which stipulated that Congress could force the president to end hostilities by passing a concurrent resolution.

As Gordon Silverstein notes, however, the War Powers Resolution has been an abject failure, freeing the president from constitutional constraints.[160] Before the War Powers Resolution the president's ability to constitutionally commit troops abroad in the absence of congressional approval was on shakier constitutional ground, and this had a constraining effect on presidential action. By allowing the president to commit troops up to ninety days without prior congressional sanction, on the other hand, the War Powers Resolution "removed any claim that the president lacked constitutional authority to use force without prior congressional authorization."[161] Presidents have taken great advantage of this newfound clarity where there was once constitutional ambiguity. Once troops are committed Congress has a difficult time ending the hostilities. Silverstein concludes, therefore, that Congress "undercut its own constitutional position without gaining anything in terms of practical control on the use of force."[162] In this regard, then, the War

[160] Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge: Cambridge University Press, 2009), 209–43.
[161] Silverstein, 220.
[162] Silverstein, 220.

Powers Resolution (with its attached legislative veto) made Congress *appear* powerful vis-à-vis the executive branch when it comes to the exercise of war powers. But this appearance has not been reality as the president's position has only been strengthened. This example demonstrates that Korn's critique of the legislative veto has a great deal of merit when applied to the right cases.

But just because the legislative veto might be inconsequential in some policy areas (such as war powers), this does not mean that the legislative veto is inconsequential across the board. In fact, although Korn contends that the legislative veto merely symbolized Congressional power rather than impacting policy outcomes in any meaningful sense, her case studies do not bear this out. In fact, her case studies, at times, demonstrate the importance of the veto. For example, Korn examines the congressional oversight of educational policy.[163] Congress inserted a legislative veto into the Education Amendments of 1972 (which established the Pell Grant financial aid program) as well as the General Education Provisions Act of 1974. The legislative veto proved inconsequential in the education context, however, because Congress used other kinds of oversight mechanisms. Indeed, even before *Chadha* Congress often chose to legislate the annual-based formulas for Pell Grants when it disagreed with the proposals coming from the executive branch rather than to exercise its veto power.[164] This makes intuitive sense given the particular disagreement with the Reagan administration at the time. The Reagan administration wanted to dramatically cut Pell Grant spending, and no funds would be

[163] Korn, *The Power of Separation*, 69–90.
[164] Korn, 77–78.

spent until a plan was finalized. Pell Grant dispersal would therefore be delayed greatly if Congress had to keep vetoing plans with which it disagreed if the administration would not come into agreement with Congress's own policy preferences on the matter. Hence, Congress chose to legislate its preferences rather than to continually veto administration plans.

After *Chadha*, however, Congress rescinded its delegation to propose the needs-analysis formulas for Pell Grants, because it viewed the legislative veto as an essential mechanism by which administration proposals reflected congressional preferences. Without the veto, Congress began to legislate the needs-analysis formulas every year. Thus, Korn concludes that the Court's invalidation of the legislative veto forced Congress to do a better job by encouraging "members to enact their policy convictions about the Pell Grant program into law." The Supreme Court, therefore, "made it easier for members to fulfill that aspect of their representative function that requires them to make Congress explicitly responsible for broadly supported public policies."[165]

While Korn effectively shows that the legislative veto was not always a decisive tool in this particular policy context, her case study is ultimately not convincing when considered against the full backdrop of delegation and the vast amount of federal regulations issued each year (3,853 final rules in 2016 alone). Indeed, even if Congress was able to micromanage the needs-analysis formula for Pell Grants, it certainly could not similarly micromanage *every* policy area it deemed important unless it was to do

[165] Korn, 90.

substantially less. Of course, many vocal opponents of the legislative veto, such as Antonin Scalia before he joined the Supreme Court, advocated just this type of return to a limited role for the national government with more specific legislation and more traditional oversight through hearings and the appropriations process.[166]

However, other scholars have demonstrated that the legislative veto was a more effective tool of congressional oversight than traditional methods. After reviewing five agency programs during the 1970s, Harold Bruff and Ernest Gellhorn concluded that the legislative veto significantly altered "the working relationship" between Congress and bureaucratic agencies, making those agencies far more responsive to congressional views than they would be absent a legislative veto provision.[167] Traditional forms of legislative oversight, such as authorization renewal and appropriations hearings, provided ad hoc and sporadic opportunities for oversight, whereas the legislative veto ensured "regular and systematic examination of the substantive details of an agency's program."[168] The legislative veto, by contrast, gave congressional committees negotiating power with agencies that helped bring final rules and regulations into alignment with congressional preferences.

Finally, it is worth noting that Korn's definition of legislative veto is limited solely to formal expressions of that power. Korn, however, argues that report-and-wait provisions — wherein federal administrators are required to publish proposed final rules

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[166] Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload," *Regulation: AEI Journal on Government and Society*, 1979.
[167] Bruff and Gellhorn, "Congressional Control of Administrative Regulation," 1420.
[168] Bruff and Gellhorn, 1423.

in the Federal Register for a specified period of time before such rules can go into effect — were highly effective at bringing the Department of Education to heel.[169] Such report-and-wait provisions, however, work almost exactly like formal legislative vetoes — as I will address in greater depth in the final section of this chapter — and, indeed, are subject to the same kind of critiques as formal legislative vetoes even as they are untouchable by the legal argument against legislative vetoes, as articulated by the Court in *Chadha*.[170] Such report-and-wait provisions, as Korn acknowledges, can be quite successful at ensuring that federal regulations reflect congressional intent because agencies and administrators are incentivized to keep good relations with their oversight committees, lest they lose funding or policy flexibility. Even so, they are generally not as effective as formal vetoes because Congress has no formal mechanism outside of enacting a statute — which would require congressional supermajorities to overcome a presidential veto — should the executive branch persist in issuing regulations with which Congress disagrees. Hence, Korn's praise of report-and-wait provisions hardly makes the case that legislative vetoes are an ineffective policy tool; rather, it suggests the opposite.

The Legislative Veto and the Politics of Negotiation and Compromise

Korn's case study with regard to foreign policy is similarly illuminating even as it also fails to convince that the legislative veto was merely a tool that allowed Congress to

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[169] Korn, *The Power of Separation*, 74.

[170] For example, Barbara Hinkson Craig's first case study in her book criticizing the legislative veto is about report and wait provisions, wherein she shows that such provisions gave Congress (and its committees) a great deal of power to negotiate and ensure that regulations come into alignment with congressional preferences. Craig, *The Legislative Veto*, 58–82; Louis Fisher, "The Legislative Veto: Invalidated, It Survives"; Berry, *The Modern Legislative Veto*, 90–99.

symbolize congressional power while, in reality, abdicating its political prerogatives vis-à-vis the executive branch. Korn examines how Congress attached the legislative veto to the Jackson-Vanik Amendment to the Trade Act of 1974, tying human rights to trade policy, specifically to the extension of Most Favored Nation (MFN) trade status. However, Congress only once attempted, and lost by a wide margin, to exercise the veto regarding the extension of MFN to Romania in 1979.[171] After *Chadha*, however, Congress had a great deal of success in confronting the executive branch over its extension of MFN by passing conditions bills (passed by both houses and signed by the president) which required that nations meet certain human rights benchmarks before the United States extended MFN. For example, Congress successfully passed a conditions bill in 1990 that tied the extension of MFN to China to certain human rights benchmarks after public outcry regarding the Tiananmen Square incident.[172] Korn concludes that these conditions bills were better than the legislative veto because it was a way to prod foreign nations to make human rights advances to receive MFN rather than for Congress to deny them MFN by exercising its veto.

This analysis also overstates the case against the legislative veto, in that it assumes that legislative vetoes were only effective if and when they were deployed by Congress. However, legislative vetoes, rather than merely serving as an outward expression of congressional power, might actually serve as a tool that fosters interbranch

[171] Korn, *The Power of Separation*, 99.
[172] Korn, 104.

cooperation and compromise that precludes publicly-visible interbranch conflict.[173] For example, when it came to foreign arms sales, Congress used the threat of the veto to force negotiation and accommodation of its views. After U.S. arms sales hit an all-time high in 1974, Congress included the Nelson-Bingham Amendment in the Foreign Aid Authorization for fiscal year 1975, requiring the president to give Congress advance notice of arms sales exceeding $25 million (reduced in 1981 to $7 million) and subjecting the proposed arms sale to a concurrent resolution of disapproval. Congress was particularly concerned that arms sales to the Middle East (both to Israel and its hostile neighbors) were creating an arms race in the region, and there was significant public concern about the issue. Congress only once threatened a veto regarding arms sales (pertaining to Hawk missiles to Jordan), but intense negotiation in the face of a legislative veto threat forced the administration to back down from its proposed arms sale and to compromise in light of congressional concerns.[174] As Martha L. Gibson notes, after this incident the viable threat of the legislative veto forced negotiation between the executive branch and Congress long before arms sale agreements were finalized and reported to Congress, thus ensuring that such deals accommodated congressional concerns during their formation. This cooperative spirit was undermined, however, by the legislative veto's invalidation. Without the legislative veto, Congress was left to engage in repeated high-profile conflicts regarding arms sales, including the introduction of joint resolutions

[173] Martha Liebler Gibson, "Managing Conflict: The Role of the Legislative Veto in American Foreign Policy," *Polity* 26, no. 3 (1994): 441–72.
[174] Gibson, 454.

of disapproval. In some instances, the president was forced to rescind arms agreements in ways that embarrassed both the United States and the recipients of arms sales.[175]

Similarly, the legislative veto protected the institutional concerns of Congress with regard to MFN trade policy and attendant human rights concerns. Unlike arms sales, MFN, generally speaking, was not an issue of high public concern. Hence, Congress could use the legislative veto to ensure interbranch compromise and negotiation, but, unlike with arms sales, Congress lacked the electoral incentives to engage in high-profile conflict with the executive branch after it lost the legislative veto. The Tiananmen Square incident, however, sparked widespread outrage in the American public and made MFN trade status a politically salient issue, providing Congress the opportunity to engage in more high-profile conflict with the executive branch by holding public hearings and passing conditions bills.[176] The point here is the legislative veto ensured compromise and accommodation with the executive branch before *Chadha*, while the high-profile interbranch conflict Korn documents with regard to China and MFN was, in many ways, due to external factors that empowered Congress vis-à-vis the executive branch in this particular context. It does not follow, therefore, that the legislative veto was wholly inconsequential to MFN trade status or that conditions bills were always the best solution.

In short, Korn's case studies overstate the case that the legislative veto was merely symbolic of congressional power. By disregarding the extent of delegation (by asserting that Congress could just legislate more specifically and micromanage policy as

[175] Gibson, 455.
[176] Gibson, "Managing Conflict."

it did with education policy) as well as by ignoring how the legislative veto fostered different types of interbranch conflict (negotiation and compromise versus high-profile conflict) across issues that varied in terms of public salience, Korn fails to account for the ways in which the legislative veto aids healthy interbranch politics. Anecdotal evidence, in other words, cannot speak to the full benefits or imperfections of the legislative veto. Moreover, it should perhaps go without saying that just because the legislative veto was not always the answer to a particular interbranch conflict does not mean that the legislative veto was wholly inconsequential in the ways that Korn suggests. However, it is valid to worry about using the legislative veto as an excuse not to do the hard work of actual interbranch politics, as demonstrated by the war powers example discussed above. Indeed, such concerns could potentially counsel against the pre-*Chadha* push to have a generic veto applied to all agency regulations rather than to use the veto where Congress most wanted the leverage. In sum, Korn's worries are ultimately worth taking seriously because she operates within the political framework of separation of powers, attempting to evaluate how well Congress performs oversight of its delegated legislative powers. The concern about inserting legislative vetoes merely to appear powerful is certainly a line of inquiry worth pursuing — and could certainly be the case at times — even if the evidence presented by Korn is ultimately unpersuasive.

The Legislative Veto and the Problem of Interest Groups Politics

The second line of critique against the legislative veto primarily concerns its application to bureaucratic rulemaking. Critics of the veto charged that it undermined the

separation of powers values applied to bureaucratic rulemaking by the Administrative Procedure Act (APA).[177] The APA is a good example of Congress attempting to ensure that its delegated powers are exercised according to separation of powers principles by requiring agency rulemaking to be made in accordance with legislative values. As David Rosenbloom notes, the legislative history of the Administrative Procedure Act of 1946 reveals that Congress views agencies as extensions of itself — a much closer relationship than a principle-agent relationship — when they engage in legislative functions delegated to them by Congress.[178] Hence, Congress went to great lengths to shape the ways that those agencies engaged in the legislative process by requiring those agencies to hold public hearings and open-comment proceedings in addition to taking congressional views into account in the formulation of final rules.

Critics of the legislative veto argue that the veto undermines these open and democratic processes by allowing powerful interest groups to lobby congressional committees behind the scenes and get those committees to use the threat of a legislative veto to move regulations closer to their preferences.[179] A few points can be made in response to these criticisms. First, the kind of interest group pressure that critics of the legislative veto point to exists even for mechanisms that are perfectly constitutional. In fact, one of Barbara Hinkson Craig's examples of this type of interest group subversion of democratic politics concerned a joint resolution, a type of legislative veto that meets

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[177] Bruff and Gellhorn, "Congressional Control of Administrative Regulation"; Craig, *The Legislative Veto*.
[178] Rosenbloom, *Building a Legislative-Centered Public Administration*.
[179] Bruff and Gellhorn, "Congressional Control of Administrative Regulation"; Craig, *The Legislative Veto*.

all of the Constitution's procedural requirements for lawmaking (bicameralism and presentment).[180] Hence, if interest group lobbying disqualifies the legislative veto, then it also calls into question perfectly constitutional methods of congressional oversight, including the regular legislative process.

Secondly, such critiques over-emphasize the democratic quality of decision-making in bureaucratic agencies (even when they operate according to congressionally-prescribed APA procedures) while overly denigrating congressional oversight, characterizing congressional procedures as dominated by special interests at odds with the public good. In fact, there is no reason to conclude that bureaucratic agencies, on the whole, do a better job of making rules in accordance with the deliberative public will.[181] For example, open comment proceedings are often dominated by those most impacted by forthcoming regulations. Indeed, as William West and Joseph Cooper note, given the massive bureaucratic apparatus it can be difficult for less financed interest groups — or, for that matter, ordinary citizens — to find out basic information about when and where such proceedings take place.[182] Moreover, given the fact that the rulemaking process can take years, well-financed interest groups are better positioned to utilize the administrative process to their advantage.

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[180] Craig, *The Legislative Veto*, 57–82.

[181] John Chubb, for example, examined energy policymaking during the 1970s (an issue area with several legislative veto provisions) and concluded that bureaucratic policymaking was "generally biased in favor of concentrated interests," while legislative participation was more inclusive. John E. Chubb, *Interest Groups and the Bureaucracy: The Politics of Energy* (Stanford: Stanford University Press, 1983), 258–64; Joseph Cooper, "The Legislative Veto in the 1980s," 373.

[182] William West and Joseph Cooper, "The Congressional Veto and Administrative Rulemaking," *Political Science Quarterly* 98, no. 2 (1983): 292–93.

In a democratic society, there is no substitute for a generalized and electorally accountable legislature tasked with weighing and balancing competing interests across policy areas. This is a job that only Congress can perform. While agencies bring expertise and single-minded focus to bear to complex problems — the reason for delegating to such agencies in the first place — agencies can also exist in a policy vacuum with attendant biases that do not reflect the general concerns of the public. This does not mean Congress will always do this job well, or that there will never be occasions where special interests rule the day. But none of these arguments prove that the legislative veto's problems outweighed its benefits, even as it points to an area of concern.

In short, while critics of the legislative veto argued that it undermined rather than served fundamental separation of powers values, closer examination points to the opposite conclusion. Given the vast number of issues of national concern, delegation empowers the executive branch and the bureaucracy to engage in Congress's legislative functions while the legislative veto ensures that the deliberative will of the people is still expressed through their representatives in Congress. Even if some evidence points to problems with the legislative veto in practice, such examples, on the whole, cannot form a principled basis for rejecting the legislative veto entirely, even as such concerns are important to note and point to ways to evaluate interbranch politics in practice.

INVALIDATED. NEVERTHELESS, IT PERSISTED[183]

The Court's decision in Chadha effectively invalidated any legislative veto that did not meet the legislative requirements of bicameralism and presentment.[184] This had dramatic effects on Congress's ability to formally oversee its delegated powers. Since 1983, Congress has not enacted veto statutes that give it the power to overturn rules and regulations by concurrent or simple resolutions of approval or disapproval. Consequently, if Congress disagrees with a particular executive action, or a rule or regulation issued from an agency, it has to mobilize and go through the full legislative process to overturn by law the specific rule or action at issue. In this situation, the interbranch dynamics greatly favor the executive branch. Given that Congress is seeking to overturn exercises of its delegated legislative power wielded by executive officials, such congressional action is far more susceptible to a presidential veto. Hence, supermajorities in both chambers are often necessary for Congress to substantively engage the executive branch to oversee its delegated legislative powers.

The cumbersome nature of the full legislative process to correct bureaucratic regulations has been on full display since Congress passed the Congressional Review Act (CRA) in 1996 as an attempt to provide oversight after the invalidation of the legislative veto. The CRA required that all final rules be presented to Congress 60 days before going into effect, thus providing Congress time to review and then possibly overturn agency regulations by passing a joint resolution of disapproval (subject to the president's veto,

[183] With apologies to Louis Fisher, Mitch McConnell, and Elizabeth Warren.
[184] Berry, *The Modern Legislative Veto*, 92–93; Korn, *The Power of Separation*, 34–36.

meaning that supermajorities in both chambers are generally necessary to disapprove). Between its enactment in 1996 and 2016, however, only one regulation was overturned, and only 5 percent of regulations promulgated by the executive branch have ever resulted in resolutions introduced on a chamber floor.[185] In recent years, the CRA has been used more vigorously. This use, however, has been contained to what might be termed "midnight rulemaking." Congressional Republicans and Republican President Donald Trump were able to use the CRA to subsequently overturn a number of last-minute rules promulgated during the last months of the Obama administration.[186] The CRA, however, is largely ineffective when the political branches disagree.

Due to the apparent failure of the CRA to give teeth to Congress's oversight of the bureaucratic rules and regulations issued in its name, Congress tried (and failed) to pass a new mechanism that, while still following the Constitution's lawmaking procedures, would greatly favor Congress rather than the president. The REINS Act (Regulations from the Executive in Need of Scrutiny) would require that any major rule with a significant effect on the national economy would be subject to a joint resolution of approval.[187] This would have the effect of turning bureaucratic rulemaking into mere legislative proposals — and agencies into study commissions — since such legislative

[185] Morton Rosenberg, "Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade," Report (Washington, D.C: Congressional Research Service, May 8, 2008); Morton Rosenberg, "Whatever Happened to Congressional Review of Agency Rulemaking: A Brief Overview, Assessment, and Proposal for Reform," *Administrative Law Review* 51, no. 4 (1999): 1051–92.
[186] Paul J. Larkin, Jr., "Reawakening the Congressional Review Act," *Harvard Journal of Law and Public Policy; Cambridge* 41, no. 1 (Winter 2018): 187–252.
[187] Berry, *The Modern Legislative Veto*, 102–4.

proposals that would only go into effect if Congress subsequently went through the full legislative process to enact them into law. While the REINS Act received the support of many commentators who hoped to see Congress regain its constitutional role in the legislative process, the legislation never passed the Senate.[188] Some constitutional scholars argued that the REINS Act would violate the Constitution by effectively giving Congress a one-house veto over proposed rules and regulations (should one house refuse to pass the proposal).[189] Given the intellectual incoherence of the *Chadha* decision, it is possible the Court would extend that logic to the joint resolution of approval mechanism by pointing to the repackaged one-house veto.

The REINs Act, however, did not pass, and so the constitutional question is moot. If it had passed, the blanket rule it established to subject all economically significant major rules to congressional approval would undoubtedly create logistical problems for Congress by forcing it to deal legislatively with every issue at a certain threshold of economic significance, thus undercutting one of the rationales for delegating in the first place.[190] One of the practical benefits of the legislative veto before *Chadha*, as discussed previously, was its relative adaptability, giving Congress the flexibility to employ it in

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[188] Adler, "Placing Reins on Regulations"; George F. Will, "A Check on the Regulatory State - The Washington Post," *The Washington Post*, June 6, 2012, https://www.washingtonpost.com/opinions/a-check-on-the-regulatory-state/2012/06/06/gJQAjmabJV_story.html?utm_term=.60d7d653f350.

[189] Ronald M. Levin, "The REINS Act: Unbridled Impediment to Regulation Fiftieth Anniversary of the Administrative Conference of the United States," *George Washington Law Review* 83 (2015 2014): 1464–81.

[190] Levin, 1453–63; Tribe, "The Legislative Veto Decision," 19. "Similarly, a law declaring that no administrative agency rule would take effect until affirmatively approved by a joint resolution of Congress and presented to the President, *while perhaps unwise*, would nevertheless be constitutional. Nothing in *Chadha,* and nothing in the Constitution, prevents Congress from reducing the regulatory agencies to the status of advisory study commissions" (Emphasis mine.)

issue areas that most concerned it and in ways appropriate to the political dynamics of specific issues (concurrent resolutions of disapproval vs. concurrent resolutions of approval, for example). With the invalidation of the legislative veto, Congress's options were severely limited. The failure of the CRA and the potential logistical nightmare of approving all major rules and regulations through the REINS Act (assuming, as I do, that it would not pose any constitutional problems) points to the difficulties with which Congress used the joint resolution mechanisms to oversee its delegated lawmaking powers.

The effects of the *Chadha* ruling, however, have not only been detrimental to effective congressional oversight powers. Stripped of the legislative veto, Congress has at times chosen to rescind or change the mechanisms by which it oversees its delegated powers, at times in ways that greatly disadvantage the executive branch. For example, after *Chadha* Congress still granted the president the power to re-organize the executive branch, but rather than subject his proposals to a simple resolution of disapproval (meaning that the plan went into effect after a certain period of time *unless* one house mobilized to veto the plan) Congress subjected the re-organization plan to a joint resolution of approval (meaning that the plan did not go into effect unless both houses of Congress legislated it into law within a specified period of time). This is a far more onerous process, and one that made it far more difficult for the president to get his plans approved. Given this, presidents stopped requesting re-organization authority soon after *Chadha*, and Congress has rarely taken on re-organization efforts itself. When it does act, as discussed previously, it does so generally only as a response to major crises rather than

with the kind of proactiveness that came with executive leadership on the issue.[191] Similarly, when the judiciary applied *Chadha* and severed the legislative veto from the Budget and Impoundment Control Act (1974), Congress rescinded the president's authority to impound or issue rescissions, prohibiting the delay of spending when the president disagreed with Congress's appropriations (even for politically justifiable reasons).[192] Invalidation of the legislative veto, therefore, disrupted robust interbranch politics over appropriations and spending wherein the branches evaluated and responded to arguments in the realm of politics rather than through legalization of their disputes.

However, it can be easy to overstate the impacts of the *Chadha* decision on the practice of interbranch politics by looking at formal exercises of the legislative veto. While the concurrent and simple resolutions have all but disappeared from the congressional arsenal, Congress has continued to attach legislative veto provisions to bills. Most often such legislative vetoes are included in appropriations bills, requiring, in fairly standard language, that specified actions may not be executed without the "prior approval of the Committees on Appropriations of both Houses," or that the appropriations committees for both houses must be notified (generally 15 days) in advance.[193] The White House has often objected to the presence of such vetoes — claiming that they violate the Court's *Chadha* decision because such congressional action is non-legislative — and, consequently, informed administration officials to ignore such

[191] York and Rachel Greszler, "A Model for Executive Reorganization," 2.
[192] Louis Fisher, "The Legislative Veto: Invalidated, It Survives," 287.
[193] Berry, *The Modern Legislative Veto*, 97.

legislative veto provisions. As Louis Fisher wrote about this phenomenon in 1993, however, it is one thing for the president to condemn such legislative veto provisions as unconstitutional, but "agencies have a different attitude. They have to live with their review committees, year after year, and have a much greater incentive to make accommodations and stick by them …. Agencies cannot risk …. collisions with the committees that authorize their programs and provide funds."[194]

When executive officials tried to disregard such legislative vetoes, they quickly learned the error of their way. For example, when President Reagan objected to several legislative vetoes requiring approval from the appropriations committees, he issued a signing statement declaring the provisions that required committee approval outside of the legislative process were unconstitutional and would therefore be implemented "in a manner consistent with the *Chadha* decision.[195] Prior to this signing statement, Congress had allowed NASA to exceed spending caps with approval from the appropriations committee. Since the administration threatened to ignore these caps, Congress threatened to remove both the veto and the administration's ability to exceed the spending caps. Consequently, if NASA needed extra funds, it would have to lobby Congress to pass a statute. NASA administrator James E. Beggs, however, departed from the administration's position and asked Congress to keep the accommodation in place. Both Congress and the executive branch, therefore, had good reason to compromise.

[194] Louis Fisher, "The Legislative Veto: Invalidated, It Survives," 288.
[195] Louis Fisher, 289; Berry, *The Modern Legislative Veto*, 84–85.

Similarly, in 1988 the Director of the OMB, James C. Miller III, protested the inclusion of a legislative veto included in the Foreign Operations Appropriations Act that required "written prior approval" from the Appropriations Committee before transferring foreign assistance funds from one account to another. Congress again threatened to remove both the veto and the State Department's ability to transfer funds under any circumstances.[196] The two sides eventually reached a compromise in 1990. That bill did not include an explicit legislative veto requiring approval, but merely inserted a report-and-wait provision into the law requiring that the Appropriations Committees receive advance notification and a written justification for any transfers. Louis Fisher described the compromise this way:

> While not articulated in the public law, those procedures require the administration to notify the Committees of each transfer. If no objection is raised during a fifteen-day review period, the administration may exercise the authority. If the Committees object, the administration could proceed only at great peril. By ignoring committee objections, the executive branch would most likely lose transfer authority the next year.[197]

Such report-and-wait provisions — which constitute the vast amount of post-Chadha legislative vetoes — perform similar functions to formal vetoes, and Congress has implemented them across issue areas. While report-and-wait provisions do not have any formal mechanism to veto specific executive action or rulemaking, they are highly effective at ensuring compliance with congressional views. Such provisions keep Congress informed of executive branch activity. If executive officials diverge too far

[196] Louis Fisher, "The Legislative Veto: Invalidated, It Survives," 290.
[197] Louis Fisher, 290.

from congressional preferences, they imperil important relationships with their oversight committees. Congress can subsequently rein in an out-of-line agency by slashing its budget, or by subjecting administrators to embarrassing public hearings. Administrators would rather avoid such scenarios.

Critics of report-and-wait provisions hoped to see them invalidated because they perform the same function as formal legislative vetoes invalidated by the Court.[198] At first, the U.S. Court of Claims did just this, striking down the report-and-wait provisions as a violation of separation of powers. While it found report-and-wait provisions to be "facially inoffensive," it was evident "from congressional and agency practice" that such provisions operated as "a *de facto*… congressional veto."[199] On appeal, however, the Appeals Court upheld the distinction between formal and informal vetoes, even though informal legislative vetoes work just like formal ones. The Court noted that "committee chairmen and members naturally develop interest and expertise in the subjects entrusted to their continuing surveillance. Officials in the executive branch have to take these committees into account and keep them informed, respond to their inquiries, and if may be, flatter and please them when necessary." Even so, "there is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government."[200]

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[198] Morton Rosenberg and Jack H. Maskell, "Congressional Intervention in the Administrative Process: Legal and Ethical Considerations" (Washington, D.C: Congressional Research Service, 1990), 30; Brett G. Kappel, "Judicial Restrictions on Improper Congressional Influence in Administrative Decision-Making: A Defense of the Pillsbury Doctrine Note," *Journal of Law & Politics* 6 (1990 1989): 135–72.
[199] *City of Alexandria v. United States* (3 CL.Ct 667, 683 (1983). Quoted in: Korn, *The Power of Separation*, 36.
[200] City of Alexandria v. United States, 737 F2d 1022, 1025 (Fed. Cir. 1984). Quoted in: Korn, 36.

The difference between these informal legislative vetoes and the formal ones invalidated by *Chadha* is that the latter mechanism, according to the Court, violates the Constitution's procedural requirements for lawmaking. In most other respects, however, they largely foster the same kind of interbranch politics that opponents of the legislative veto found so objectionable in the first place. Indeed, the logic of the *Chadha* decision is that Congress can only act legislatively. The Court went to great lengths to explain why the framers were so concerned with the powers of Congress that its powers were the most circumscribed. Therefore, Congress could not act to even oversee its delegated legislative functions unless it went through the entire legislative process. After Congress legislates, the executive branch administers the government.

This artificial, and static, notion of separation of powers imposed by the Court in *Chadha* has ultimately proven undesirable and unworkable for both branches. The framers constructed a separation of powers system in which the branches would negotiate the limits of their respective powers in ordinary political disputes rather than according to static legal rules. The legislative veto is a prime example of interbranch politics wherein both branches negotiated the limits of their powers and came up with a working relationship that, while changing the order of interbranch action when it comes to lawmaking, maintained the substantive involvement of the branches.

Hence, the executive branch was granted vast discretionary power to engage in the lawmaking function typically reserved to Congress, allowing the government to overcome legislative inertia by harnessing the expertise and efficiency that comes with executive government. The legislative veto, on the other hand, ensured that executive

branch exercises of legislative power accorded with the deliberative public will by requiring that exercises of delegated power only occurred with the consent of Congress. If the executive branch objected to the presence of legislative vetoes, Congress could refuse to delegate power in the first place, choosing instead to legislate with more specificity, and thus denying the executive branch the flexibility and discretion it wanted, and that good government often requires.

The Court's formalistic focus missed these larger political dynamics that, far from being contrary to the Constitution, are, rather, the product of it. Given this, it is hardly surprising that such interbranch negotiation has continued despite the Court's intervention. The Court's notion of separation of powers articulated in *Chadha* can thus best be seen as layered on top of a working political order, disrupting the practice of healthy politics, but not entirely displacing it. The fact that interbranch politics has persisted in much the same way points to the vitality of the Constitution's political architecture in spite of the negative, and very real, effects of bad judicial reasoning.

Executive Agreements, Treaties, and the Constitution's Political Architecture

The Constitution specifies only one mechanism for entering into international agreements: the treaty. Article II, Section 2, Clause 2 provides that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Today, however, the vast majority of international agreements entered into by the United States are concluded as executive agreements, not treaties. The president enters most of these agreements without subsequent congressional ratification. Such agreements have been used in limited contexts since the founding.[201] However, the economic challenges of the Great Depression and the national government's unprecedented actions to deal with them — including the transnational dimensions of those issues — resulted in a significant increase in the use of executive agreements. In addition, the United States' move away from isolationism to embrace its role as a superpower in an increasingly globalized world following the Second World War meant that the foreign affairs agenda of the United States dramatically increased.[202] The volume of the United States' global interactions following the New Deal and World War II, therefore, meant that it would be literally impossible to conduct international agreements through the cumbersome treaty ratification process. As Louis Fisher has argued, executive agreements are an essential

[201] Oona A. Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States," *The Yale Law Journal* 117, no. 7 (2008): 1236–1372. For example, at the outset of American government, Congress authorized the executive branch to enter executive agreements to establish postal service with foreign nations.
[202] Ibid.

feature of modern government due to the "sheer increase in volume of the amount of business and contacts between the United States and other countries."[203] Today, treaties comprise approximately only 5 percent of international agreements entered into by the United States, while the United States enters into approximately 300-400 executive agreements per year.[204] There is widespread consensus, moreover, that such executive agreements are legally interchangeable with treaties.[205]

The purpose of this chapter is to consider the use of executive agreements from a political understanding of the Constitution's separation of powers. Executive agreements, in this way, can be understood and evaluated by looking to the larger frame of American constitutionalism, to the specific institutional competencies of the branches based on their differing institutional designs, and, more fundamentally, to the purposes underlying those particular design choices. In other words, even as the United States departs from the

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[203] Treaties and Other International Agreements: The Role of the United States Senate. A Report by the Congressional Research Service. 2001, 40.

[204] Hathaway; Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law," *Harvard Law Review* 131, no. 5 (March 2018): 1203–97. Such executive agreements are concluded in a number of forms. Perhaps most controversial are those agreements concluded as sole executive agreements, which are concluded based solely on the President's independent constitutional powers in Article II related to his diplomatic prerogatives and his independent powers as commander-in-chief. Other executive agreements are made pursuant to a treaty obligation, intended to bring the United States into compliance with its treaty obligations. The vast majority of executive agreements are congressional-executive agreements, which can be broken down into two categories. *Ex post* congressional-executive agreements are similar to treaties in that such agreements entered into by the executive branch are subsequently approved by Congress. However, rather than ratification by a supermajority of the Senate, such agreements are authorized by majority vote in both chambers. Such *ex post* congressional-executive agreements have been used for international agreements of major consequence, such as The World Bank and the Bretton Woods Convention. They have also been used for major trade agreements such as the World Trade Organization and NAFTA. With but a few exceptions, however, such agreements have been limited to areas (international trade and commerce) that Congress can govern based on its Article I powers. Moreover, such agreements are rare, constituting less than one percent of all international agreements entered into by the United States. The vast majority of executive agreements — approximately 80-85 percent — are based on delegated authority to the executive branch to enter into agreements (*ex ante* congressional-executive agreements). Foreign aid agreements, for example, constitute a large percentage of such agreements.

[205] See Restatement (Third) of Foreign Relations Law § 303 (1987).

literal strictures of the Treaty Clause in the vast majority of international agreements that it enters into, the values underlying the Treaty Clause and the reasons undergirding its specific allocations of power provide constitutional criteria for evaluating interbranch behavior as they negotiate their boundaries concerning the ways the United States binds itself internationally.

Through attentiveness to the goods that differently designed institutions bring to foreign affairs, it is no surprise that the vast majority of international agreements entered into by the United States are *executive* agreements, given the executive branch's institutional advantages in the foreign affairs arena. These advantages, as I will indicate, are based on a principled commitment to effectiveness in foreign affairs, a commitment made all the more obvious by contrast with the ineffectiveness of the Articles of Confederation in the absence of a unitary and independent executive.[206] An understanding of the political purposes underlying the Treaty Clause, therefore, can assuage some of the concerns of political scientists who see the rise of executive agreements as indicative of an imperial presidency circumventing Congress.[207] Attention to the deeper political commitments of the constitutional order, moreover, reveals that the rise of executive agreements is not merely the result of "rational actors" updating their

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[206] Charles C. Jr Thach, *The Creation of the Presidency, 1775–1789*, New Edition edition (Indianapolis: Liberty Fund, Inc., 2010); Louis Fisher, "The Efficiency Side of Separated Powers," *Journal of American Studies* 5, no. 2 (1971): 113–31; Gary J. Schmitt, "Separation of Powers: Introduction to the Study of Executive Agreements," *American Journal of Jurisprudence* 27 (1982): 114–38.

[207] Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate*, Contemporary Political and Social Issues (Ann Arbor: University of Michigan Press, 2005); Matthew A. Crenson and Benjamin Ginsberg, *Presidential Power: Unchecked and Unbalanced*, 1st ed (New York: Norton, 2007); Arthur M. Schlesinger, *The Imperial Presidency* (New York: Popular Library, 1974).

institutions to meet the needs of foreign affairs.[208] This characterization is true as far as it goes, but it suggests that modern constructs are the result of adaptation disconnected from principled constitutional commitments. Rather, as I will argue, the rise of executive agreements is not an example of "updating" the constitution, but their use, within certain limits, is the working out of the Constitution's political logic.

But, of course, the use of executive agreements cannot be endlessly malleable if the Constitution is to maintain its basic character. Even when the branches depart from the literal strictures of the Treaty Clause, the Clause — by how it allocates power between the branches — points to political criteria that should guide the branches in their deliberations about when an agreement is acceptably an executive agreement versus one requiring a stronger form of congressional authorization. As I will argue, the choice of the Senate — and the reasons underlying that choice — points to a concern that the House of Representatives is constructed to be too reflective of momentary, and at times fleeting, changes in public opinion. The framers thus signaled the need for significant international agreements to have sufficient buy-in from Congress to ensure a stable foreign policy, thus safeguarding the credibility of the nation in the foreign arena. The point here is not to dwell too legalistically on the choice of the Senate — or to suggest that the Senate still retains these advantages vis-a-vis the House — but, rather, to underscore the kind of political criteria undergirding the specific choice, criteria that can, and should, guide congressional claims to authority over international agreements.

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[208] Glen S. Krutz and Jeffrey S. Peake, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (Ann Arbor: University of Michigan Press, 2009).

To think constitutionally about executive agreements, in short, requires attentiveness to the reasons underlying specific design choices and the ways in which the framers constructed a system to harness the institutional advantages of the executive branch in foreign affairs while ensuring that major commitments enjoy widespread public support and, consequently, establish the conditions for a stable and effective foreign policy that wins the trust of foreign nations. From an architectonic perspective, then, the rise of executive agreements is more properly viewed as the outworking of a deeper political logic wholly consistent with the original design understood, as articulated in *The Federalist*, as fully adaptable to meet the needs and exigencies of unforeseen circumstances while maintaining its basic character through the interior structure of the government. The use of executive agreements, in other words, is not structured or constrained by legal limits, but through political negotiation (or conflict) between the branches (whether effective or otherwise), that negotiation tethered to legitimate constitutional claims deduced from the basic principles undergirding their offices and shared powers.[209]

This chapter will begin with a discussion of the positive purposes of a vigorous executive branch in foreign affairs, and how executive agreements can be understood in light of this commitment to vigorous executive power in the foreign arena. This section will detail the ways in which Congress can use its institutional capacities to oversee executive agreements. It is difficult to imagine the President breaking completely free

[209] See Federalist 23 and 41, for example.

from separation of powers constraints given Congress's political controls, such as its power over appropriations, should Congress exercise its powers effectively. The major problem with executive agreements today, I argue, is not executive pre-predominance per se, but a lack of effective oversight by Congress through its failure to ensure transparency.[210] While Congress requires that the executive branch transmit the text of executive agreements to Congress within 60 days of entering into force, the executive branch has not often complied and many agreements are either never transmitted to Congress or are substantially late. Moreover, while the State Department posts the texts of international agreements on its website, reporting is rarely up-to-date and agreements are posted without any reference to their legal authorization, thus making it very difficult — if not impossible — for citizens to monitor the use (or abuse) of executive agreements. The reporting system for executive agreements stands in marked contrast to reporting requirements under the Administrative Procedure Act, which lists all the rules and regulations in the Federal Register, thus allowing for Congress and concerned citizens to oversee rulemaking in the administrative state. Transparency, I argue, is necessary if Congress is to mobilize its other political capacities in response to executive agreements because information is a necessary predicate for interbranch negotiation and contestation.

The second part of this chapter will consider the criteria, previewed above, that should guide the branches (especially Congress) as they negotiate when an agreement is appropriately an executive agreement versus one requiring more congressional input.

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[210] Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law."

There is a great deal of evidence to suggest that Congress has often guarded its prerogatives over treaty-making, demanding that important agreements be submitted to the Senate as treaties (regardless of the partisan dynamics between the institutions) and that presidents have complied with congressional demands even when doing so has ensured defeat for particular treaties.[211] While these interbranch negotiations often have exhibited a great deal of constitutional health, Congress has at times failed to show sufficient political ambition, deferring to legal arguments about executive power rather than asserting its political prerogatives. This chapter will consider the interbranch negotiations concerning the Iran Agreement, arguing that although the President had the legal authority to enter into the agreement, Congress was insufficiently motivated by its own political prerogatives to ensure that important changes to American foreign policy — regardless of the President's legal authority — receive sufficient support in Congress to be durable commitments. The lack of congressional buy-in, moreover, left the agreement politically vulnerable to the whims of the next president.

The allocations of power in the Treaty Clause point to an evaluative framework for constitutional politics. This chapter will consider the use and scope of executive agreements in light of that framework. While the proliferation of such agreements, at least at first glance, appears to be yet another instance of presidential aggrandizement, this conclusion is tempered by understanding the basic frame of the constitutional order and the ways success in foreign affairs requires the political capacities and strengths of

[211] Krutz and Peake, *Treaty Politics and the Rise of Executive Agreements*; Curtis A. Bradley and Trevor W. Morrison, "Historical Gloss and the Separation of Powers," *Harvard Law Review* 126, no. 2 (2012): 411–85.

the executive branch. What appears to be presidential overreach, however, is magnified by the ways that Congress has at times abdicated its own responsibilities or failed to be properly motivated by its constitutional duties.

FOREIGN AFFAIRS AND THE LIMITS OF CONSTITUTIONALISM

A discussion of treaties and executive agreements in the context of the Constitution's political architecture is illuminating because international agreements pose particular, and complicated, problems for the practice of constitutional government. Alexander Hamilton acknowledged as much when he answered the objections of those who argued that the treaty-making power ought to be lodged either exclusively with Congress or with the President. Indeed, when Hamilton took up the Treaty Clause in *Federalist* 75 he argued that treaty-making, in its essence, "does not seem strictly to fall within the definition of either one of them." In the ordinary practice of constitutional government, the purpose of the legislative branch, Hamilton asserts, is to "prescribe rules for the regulation of the society," while the purpose of the executive branch is to employ the common strength, "either for this purpose or for the common defense." Treaties, however, strain the constitutional enterprise because they do not fit neatly into either category. Rather, Hamilton argues,

> Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.[212]

[212] Alexander Hamilton et al., *The Federalist Papers*, ed. Clinton Rossiter, 1 edition (New York, NY: Signet, 2003), 499.

In other words, the framers recognized, following classical separation of powers theorists such as John Locke and the Baron de Montesquieu, that the foreign arena is a realm that poses unique problems for constitutional government because law cannot bind foreign nations in the same way that it can bind citizens within a regime.[213] Indeed, in the context of a specific regime, people leave the state of nature, forming a social contract by which individuals collectively transfer the power to enforce the law and protect natural rights to the community as a whole, setting up a government to serve as an impartial judge and enforcer of their own natural rights against the claims of others. Government thus serves a kind of settlement function, and law brings order and stability where there was once chaos.

Such stability, however, is impossible to maintain — at least to the same degree — in the international arena where no such overarching, and impartial, government regulates the constituent parts of the international order. The international arena, in other words, always exists in a state of nature, and potentially a state of war. Locke makes this clear in his discussion of the federative power. While it is typical to think of separation of powers as the division between three types of power — legislative, executive, and judicial — the federative power, according to Locke, is the power of a constitutional regime "to respond to actions of foreigners" rather than to direct the actions of those who

[213] For a more in-depth discussion of the thought of Locke and Montesquieu on foreign affairs, see: Gary J. Schmitt, "Separation of Powers: Introduction to the Study of Executive Agreements," *American Journal of Jurisprudence* 27 (1982): 114–38.

live within the regime.[214] This power, moreover, is far more difficult for governments to exercise than the mere enforcement of their laws because the "plans and interests of foreigners vary so greatly that they cannot be anticipated by a set of standing laws for each eventuality."[215] Hence, it is particularly important that the power over foreign affairs "be left in great part to the prudence of those who have it, trusting them to do their best for the advantage of the commonwealth."[216] It is this unique nature of foreign affairs — its unpredictability and chaos, and the impossibility of providing the kind of internal stability that inheres within a regime governed by law — that led Hamilton to assert that treaties form a unique department for constitutional government, stretching the very limits of constitutional government itself as it seeks to preserve itself in its dealings with foreign nations.

The question thus becomes, how did the framers design an institutional framework to achieve the aims of the constitutional order in foreign affairs, and what does the nature of that design tell us about what we ought to expect with regard to a phenomenon such as executive agreements? Returning to Federalist 75, Hamilton supplies an answer by noting that it is important to consider the *qualities* the two branches bring to bear on foreign affairs:

> The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead

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[214] John Locke, *Second Treatise of Government*. Early Modern Texts, 47. Retrieved at: https://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf
[215] Locke, 47.
[216] Locke, 47.

> strongly for the participation of the whole or a portion of the legislative body in the office of making them.[217]

It must be stressed that Hamilton emphasizes the positive contributions of differently structured institutions for the practice of foreign affairs. The branches do not share power in treaty-making merely to check each other. Rather, they share power because the nation's effectiveness in foreign affairs, and the purposes of republican government, require the involvement of these differently structured institutions. It makes sense, therefore, to take each of the two institutions — and their role in foreign affairs — in turn. The purpose of doing so is not to highlight the specific constitutional line-drawing encapsulated by the Treaty Clause so much as it is to underscore the animating values of the Treaty Clause and how those values provide constitutional criteria for evaluating interbranch politics as it relates to international agreements. In other words, what positive attributes do the branches bring — based on the type of institutions that they are — to the forming of international agreements and how, then, can we evaluate interbranch politics when the vast majority of international agreements are not conducted as treaties?

EXECUTIVE POWER IN FOREIGN AFFAIRS

It is important to note at the outset the extent to which the Constitution makes provision for the effective use of executive power, and how this was seen as essential, especially in the context of foreign affairs. The executive branch is structured to meet the

[217] Hamilton et al., *The Federalist Papers*, 499.

needs of the nation, both domestically and in foreign affairs, through its independent and unitary structure. In other words, the executive branch is structured to summon the nation's strength in foreign affairs because its powers are derived directly from the Constitution and are not dependent upon the powers of the other branches to implement them.

This conception of executive power — power derived from the Constitution itself and not formally dependent, at least in an legal sense, upon the will of Congress — differs substantially, however, from constitutional orthodoxy today wherein the powers of the executive branch are seen, to a large extent, to be legally dependent, at least to some degree, upon congressional approval or sanction. Justice Jackson supplied this general maxim when he famously wrote in *Youngstown Sheet and Tube Co. v. Sawyer* (1952) that "[p]residential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress."[218] Indeed, Jackson asserted that the president's power is at the maximum when he acts "pursuant to express or implied authorization of Congress," that the president's power is at its "lowest ebb" when he acts contrary to congressional authority," and that, finally, there is a "zone of twilight" when it is impossible to determine whether Congress supports particular actions. This tri-part schema has provided a paradigm for legal assessment and enforcement of interbranch boundaries by the judiciary.[219] Moreover, this framework has often been used to assess

[218] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[219] See *Dames & Moore v. Regan* (1981).

whether executive agreements are constitutionally legitimate, at least in a legal sense.[220] This legalistic notion of the president's powers vis-a-vis Congress, however, makes the president subordinate to Congress. As Joseph Bessette argues, according to the Court's notion of separation of powers when the powers between the two branches conflict, "Congress retains all its authority, while the president loses all overlapping powers to Congress."[221]

The framers, however, recognized that a vigorous executive branch — wholly independent from Congress for the exercise of its own powers — is essential to success in foreign affairs. Writing about the importance of executive power to the effectiveness of government more generally in *Federalist* 70, Hamilton argued that executive vigor is essential to the maintenance of constitutional government because it supplies energy to the constitutional order. Indeed, Hamilton asserted that, "[e]nergy in the executive is a leading character in the definition of good government."[222] A feeble executive, on the other hand "implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[223]

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[220] Harold Hongju Koh, "Triptych's End: A Better Framework To Evaluate 21st Century International Lawmaking" 126 (January 2018): 338–68.
[221] Joseph M. Bessette, "Confronting War: Rethinking Jackson's Concurrence in Youngstown v. Sawyer," in *The Limits of Constitutional Democracy*, ed. Jeffrey K. Tulis and Stephen Macedo (Princeton: Princeton University Press, 2010), 206.
[222] Hamilton et al., 421.
[223] Hamilton et al., 422.

Hamilton goes on to list the "ingredients" of executive energy: "unity; duration; and adequate provision for its support; and competent powers."[224] Unity is particularly important for the present discussion, especially as it pertains to the government's effectiveness in foreign affairs. Unity can be undermined in one of two ways. First, it can be destroyed by vesting the executive power in more than one individual. Secondly, and crucially, unity can be destroyed by vesting the executive power "ostensibly" in one person, but subjecting that person "in whole or in part to the control and cooperation of others, in the capacity of counselors to him."[225] The quality of energy so essential for effective governance is thus secured and induced by designing an executive branch that is wholly independent of Congress — with powers derived from the Constitution itself — and headed by a single individual. In the ordinary practice of governance, deliberation on the merits of public policy is essential, but it is no less essential to have an institution designed to implement and enforce the laws with vigor and efficiency, and to act quickly and decisively when the laws do not speak to certain contingencies or, perhaps more importantly, when emergencies require particularly decisive action to preserve the regime from both internal and external threats.

Such qualities are particularly important in the arena of foreign affairs, where deliberation, perhaps even more than in a domestic context, is more often a liability than an asset. Experience under the Articles of Confederation confirmed the necessity of executive vigor for the effective practice of government generally, but especially for

[224] Hamilton et al., 422.
[225] Hamilton et al., 423.

effectiveness in the foreign arena. Under the Articles, there was no independent executive branch.[226] Rather, Congress retained for itself the executive tasks associated with foreign affairs by either dealing with such tasks as an entire body or by delegating certain executive tasks to committees or boards responsible to the whole.[227] This often proved to be a disaster, as deliberation often hampered the government's ability to act as quickly and effectively as circumstances required. Writing about the difficulties of legislature-centered government, Hamilton asserted:

> Another defect in our system is want of method and energy in the administration. This had partly resulted from the other defect [the weakness of Congress]; but in a great degree from the prejudice and the want of a proper executive. Congress have kept the power too much in their own hands and have meddled too much with details of every sort. Congress is, properly, a deliberative corps, and it forgets itself when it attempts to play the executive. It is impossible such a body, numerous as it is, and constantly fluctuating, can ever act with sufficient decision or with system.[228]

John Jay, as Minister to Spain and Secretary of Foreign Affairs, also dealt with the inadequacies of legislature-centered governance, writing to George Washington that the committee system that Congress had established to oversee foreign affairs lacked "system, attention and knowledge."[229] When Jay became Ambassador to Spain in 1780 he was forced to rely on credit while waiting for Congress to issue appropriations, and he rarely — in fact, only once — received communications from the Committee on Foreign Affairs, which he wrote was "not worth a farthing."[230] Separation of powers — more

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[226] Fisher, "The Efficiency Side of Separated Powers"; Thach, *The Creation of the Presidency, 1775–1789*.
[227] Thach, *The Creation of the Presidency, 1775-1789*.
[228] Schmitt, "Separation of Powers."
[229] Fisher, "The Efficiency Side of Separated Powers," 120.
[230] Fisher, 120.

specifically, the creation of an independent executive branch — was essential, according to Jay, if the United States was to conduct itself successfully in the arena of foreign affairs. Writing to Thomas Jefferson about the need to divide the government into three distinct departments — executive, legislative, and judicial — Jay asserted that:

> Congress is unequal to the first, very fit for the second, and but ill calculated for the third; and so much time is spent in deliberation, that the season for action often passes by before they decide on what should be done; nor is there much more secrecy than expedition in their measures. These inconveniences arise, not from personal disqualifications, but from the nature and construction of the government.[231]

By the time of the Constitutional Convention, Charles Thach notes, the Continental Congress "was a thoroughly discredited body," because it was so unable to perform executive and administrative tasks efficiently and effectively.[232] Indeed, Thach continues,

> [Congress] exercised the great nonlegislative powers of appointment, of determining financial policy, and of control of foreign affairs as well. Its incapacity in all three lines of endeavor is too well known to require demonstration. Factional differences kept important offices unfilled for long periods. Time and again purely personal considerations proved the governing factor in determination of foreign policy. The laborious efforts to draft instructions for the negotiations of the treaty of peace with the accompanying intrigues of the French faction against the English faction served to prove Congress as incompetent in this capacity as in its strictly administrative character.[233]

Hence, the qualities of an independent and unitary executive branch are meant to make the government more effective in foreign affairs in ways that a legislature is

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[231] Fisher, 121.
[232] Thach, *The Creation of the Presidency, 1775–1789*, 64.
[233] Thach, 63–64.

unlikely to be able to achieve given that its plural structure. Given these structural advantages in foreign affairs, the framers placed the power to make treaties with the executive branch. As Gary Schmitt notes, the framers did not give the power to make treaties to the president (or, for that matter, make the president commander-in-chief) until the executive branch had been structured to be a safe repository of those powers by securing its independence from Congress and by vesting the power in a single head: "If institutional independence was a critical requirement for both the effective and safe use of such a power, then the framers were sound in their determination to withhold those powers until a proper repository could be built."[234]

The advantages of the executive branch in foreign affairs in general and in the formation of international agreements are fairly obvious. The formation of treaties, "of whatever nature," according to Jay in *Federalist* 64, requires the virtues of the executive branch because their negotiation almost always requires "perfect *secrecy* and immediate *dispatch.*"[235] A legislature is often not able to provide this, which, as evidenced by practice under the Articles of Confederation, hinders the ability of the national government to negotiate treaties effectively.[236] Foreign adversaries, motivated by either "mercenary or friendly motives," are doubtless more likely to rely on the secrecy of the

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[234] Schmitt, "Separation of Powers," 129.

[235] Hamilton et al., *The Federalist Papers*, 390.

[236] Early practice under the Constitution also confirmed the inability of Congress (as a plural body) to deal well in the foreign affairs arena. During the negotiation of the Jay Treaty of 1795 (a crucial treaty with England to resolve issues remaining after the revolution), a senator involved in the negotiations leaked information regarding the negotiations to a local newspaper. This reinforced President Washington's view that the Senate was not "a safe repository for diplomatic secrets." See: Joseph Ralston Hayden, *The Senate and Treaties, 1789-1817: The Development of the Treaty-Making Functions of the United States Senate during Their Formative Period*, University of Michigan Publications. Humanistic Papers (New York: Macmillan, 1920), 90–93.

President than they are to confide in the Senate, “and still less in that of a large popular assembly.”[237] Moreover, the tides and fortunes are constantly shifting in foreign affairs, and the government needs the ability to respond quickly to events that are seldom predictable and often defy the most carefully laid out plans. According to Jay in *The Federalist*:

> The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in a capacity to improve them.[238]

Lodging the power to negotiate and make treaties with foreign nations in the executive branch thus ensures that secrecy and dispatch appropriate to the needs and contingencies of quickly changing circumstances in foreign affairs are met. Indeed, it is for these functional reasons — the ability to act with vigor, decisiveness, and secrecy as the circumstances require — that led classical separation of powers theorists Locke and Montesquieu to place the federative power (which included the power to make treaties and to conduct war) solely with the executive branch, citing the inability of a deliberative body to adequately meet the exigencies of foreign affairs. As Montesquieu, for example, wrote, discussing the importance of giving the executive full control over the military, "[w]hen once an army is established, it ought not to depend immediately on the legislature, but on the executive power; and this from the very nature of the thing, its

[237] Hamilton et al., 390–91.
[238] Hamilton et al., 391.

business consisting more in action than in deliberation."[239] Rather than involving the legislature in a formal sense in the negotiation and ratification of treaties, the legislature was to be given other powers, such as power over appropriations, meant to influence, though not directly control, the actions of the executive branch. The legislature can limit executive discretion by exercising its own political prerogatives over appropriations and its determinations about the size of the army and even the types of weapons that the legislature will fund. As Josh Chafetz notes, Congress's power over the purse gives it substantial power to limit presidential discretion with regard to the exercise of its foreign affairs powers by, for example, choosing to eliminate funding for new aircraft carriers or long-range bombers, thus making it more difficult for the president to "project American power overseas."[240]

The essential point for Locke and Montesquieu — and, indeed, for the framers who experienced first-hand the problems associated with government absent an appropriately-designed executive branch — was that foreign affairs requires the vigor and efficiency that comes from a unitary and independent executive branch, and that provision must be made to ensure the effective use of executive power. In short, as Gary Schmitt has argued, "[b]y separating executive power from legislative power the Constitution frees the executive to meet the exigencies of foreign affairs, thereby increasing the overall capacity of the government."[241] The Constitution vests the executive power in the

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[239] Montesquieu, *The Spirit of the Laws*. Trans. Thomas Nugent. (New York: Hafner, 1949), 161.
[240] Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (Yale University Press, 2017), 74.
[241] Schmitt, "Separation of Powers," 115.

president, providing the president all powers necessary to act to preserve the nation in its dealings with foreign nations. Given that the needs and exigencies of the nation in the foreign sphere are, by their nature, illimitable, the executive is granted power to meet these needs. The executive's power expands as the needs of the nation in the foreign sphere expand given the executive's distinct institutional advantages in foreign affairs. As Madison argued in *Federalist* 41, to place legal limitations on the government's ability to meet the needs of foreign affairs would shackle the government, preventing it from attaining legitimate constitutional ends, including, potentially, the very survival of the constitutional order:

> The means of security can only be regulated by the means and the danger of attack. The will, in fact, be ever determined by these rules and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.[242]

There is thus an inherent tension between the aims of republican government and the ability for the government to preserve itself in its dealings with foreign nations. In *Federalist* 70, Hamilton did not, perhaps, assuage the concerns of those who feared a "vigorous Executive is inconsistent with the genius of republican government." Rather, he argued, the "enlightened well-wishers to this species of government must at least *hope* that the supposition is destitute of foundation" given that vigorous executive power is an essential ingredient to good government, and, indeed, a necessary ingredient for the very

[242] Alexander Hamilton et al., 253.

survival of the constitutional order itself.[243] In other words, republican government can only be maintained with a vigorous executive branch with the capacity to act to meet the needs of the nation, and this capacity can only be ensured by a grant of power directly from the Constitution to the president rather than by shackling the executive branch to the legislature.

This is not to say that the president's power over foreign affairs is illimitable and that any action the president takes to preserve the nation in foreign affairs is constitutionally legitimate. To return to Jackson's concurrence in *Youngstown*, there is an element of truth to the notion that the president's power fluctuates according to the views of Congress, but, contrary to Jackson, this power is constrained not by legal limitations (presumably enforceable by the judiciary) but by the exercise of Congress's own political prerogatives over and against the executive branch should Congress disapprove of exercises of executive discretion.

In short, if separation of powers is ultimately a principled division of labor meant to promote the efficient and effective use of power, then the executive's predominance in foreign affairs should come as no surprise, and neither should *executive* agreements. In other words, the rise of and use of executive agreements does not, at least in principle, mean that the executive branch has exceeded separation of powers constraints because Congress has political capacities (often retrospective) that it can mobilize to oversee, and constrain, the use of executive agreements.

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[243] Thach. See Herbert Storing's introduction to the 1969 edition, published as an appendix to the edition cited here.

THE USE AND CONTROL OF EXECUTIVE AGREEMENTS

Before turning to the Senate's shared powers over treaty-making and how the reasons underlying that shared power ought to inform how Congress seeks to advance its own prerogatives over international agreements (asserting its prerogatives especially when certain international agreements, because of their importance to American foreign policy, require more stringent legislative scrutiny and involvement), it is worth pausing to examine the use of executive agreements in general and the reasons why they are used. As should be clear from the previous section, the rise of executive agreements is, in many respects, the outworking of a principled division of labor. The executive branch has gained pre-dominance in the field not as the result of historical accident or the rational updating of institutions, but because an independent and unitary executive branch is structured to be pre-eminent in foreign affairs because the nation's vitality in the foreign sphere requires it. This section will thus consider how executive agreements are used and how they are reconciled with the constitutional structure (i.e. how does Congress maintain oversight of executive agreements, effectively or otherwise?). Executive agreements are not uniformly controversial. Indeed, how controversial an executive agreement is ultimately depends on whether an executive agreement is entered into pursuant to a statutory grant of power by Congress or whether it is based solely on the president's Article II powers.

Ex Ante Congressional-Executive Agreements

The vast majority of executive agreements are concluded based on delegated power from Congress in what are known as ex ante congressional-executive agreements.

Given transparency issues — which will be discussed at length later on — it is impossible to know the precise number or percentage of executive agreements entered into based on delegated statutory authority, although most scholars estimate that such agreements constitute roughly 80-85 percent of all executive agreements.[244]

Congress makes these delegations, as it often does in a domestic context, because it cannot conceivably respond quickly to rapidly changing situations on the ground. The reasons for congressional delegation to the executive branch in the foreign sphere, however, are magnified compared to the reasons in the domestic context given the volatility of foreign affairs. The precedent for future ex ante congressional-executive agreements based on delegated statutory power was set when — at the height of the New Deal — President Roosevelt requested power to act quickly in negotiating reciprocal trade agreements without returning to Congress for approval.[245] Faced with an

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[244] Hathaway, "Treaties' End"; Ryan Harrington, "Understanding the 'Other' International Agreements," *Law Library Journal* 108, no. 3 (June 2016): 343–59. This estimate is taken from Oona Hathaway's exhaustive empirical study on executive agreements. As will be explained later, because the legal basis for international agreements other than treaties is never publicly available, it is nearly impossible for members of the public to ascertain the legal basis for executive agreements. While such agreements are posted on the State Department website (though there are major reporting problems), they are interspersed with treaties and no distinction is made between different types of agreements (sole executive agreements, ex ante congressional-executive agreements, or executive agreements made pursuant to a treaty obligation). Hathaway estimates that nearly 80-85 percent of executive agreements are authorized by statute after conducting searching the Statutes at Large for keywords that could match the substance executive agreements concluded between 1980-2000. Given the guesswork involved, of course, this is only an estimate. This estimate, moreover, is in keeping with Loch Johnson's 1984 study in which he estimated that around 87 percent of executive agreements were based on statutory authority. Similarly, Gary Schmitt, in his 1983 study of military agreements, found that 85 percent of all such agreements from 1946-1973 were authorized (at least in some way) by statute.

[245] Such agreements were not entirely unprecedented. The McKinley Tariff Act of 1896, for example, enabled the President to enter into certain reciprocal trade agreements on certain specified commodities. However, the extent of the delegated authority during the New Deal was unprecedented in its scope and delegation to the executive branch since that time has only increased. Issues concerning ex ante congressional-executive agreements will be discussed in a later section.

unprecedented economic collapse and the need to deal with the global implications of the Great Depression, President Roosevelt asked Congress to grant the executive branch the power to negotiate reciprocal trade agreements that could change tariffs up to 50 percent of what Congress had established by law. As Roosevelt argued to Congress:

> Other governments are to an ever increasing extent winning their share of international trade by negotiated, reciprocal trade agreements. If American agricultural and industrial interests are to retain their deserved place in this trade, the American government must be in a position to bargain for that place with other governments….
>
> If the American government is not in a position to make fair offers for fair opportunities, its trade will be superseded. If it is not in a position at a given moment rapidly to alter the terms on which it is willing to deal with other countries, it cannot adequately protect its trade against discriminations and against bargains injurious to its interests. Furthermore, a promise to which prompt effect cannot be given is not an inducement which can pass current at par in commercial negotiations.
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> For this reason, any smaller degree of authority in the hands of the Executive would be ineffective. The executive branches of virtually all other important trading countries already possess some such power.[246]

In response, Congress voted overwhelmingly to grant President Roosevelt the authority he requested. In doing so, Congress acknowledged the President's concern that the United States would not be able to achieve its international objectives if the Senate were to convene to approve every such agreement. When Congress reauthorized the delegation to enter into executive agreements in 1937 the Senate Report asserted that "[t]rade agreements should not be subjected to the cumbrous treaty-making procedure."[247]

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[246] Bruce A. Ackerman and David Golove, *Is NAFTA Constitutional?* (Cambridge, Mass: Harvard University Press, 1995), 847.
[247] Ackerman and Golove, 851.

The House or Representatives Report further underscored the need for executive vigor if the United States was to accomplish its trade objectives, acknowledging that congressional procedures were not adequate to the needs of the moment:

> The Senate and the House of Representatives are in session for only part of the year and in recent years the demands upon their time when in session have been enormous. Were either senatorial or congressional ratification to be required, the inevitable delay and the further uncertainty as to ratification would go far toward destroying the incentive of foreign government to enter into any trade negotiations at all.[248]

Congress and the President, therefore, negotiated their boundaries with respect to international trade, determining, through their deliberations, that the institutional advantages of the executive branch needed to be harnessed to ensure effectiveness in international commerce, especially at a moment of great crisis. Such discretion in this case, moreover, was not unlimited as Congress's delegations were limited and periodically renegotiated. In this way, Congress delegated power to the executive branch to perform an essential function that could not conceivably be accomplished through the treaty ratification process, but it also ensured that this executive discretion would be evaluated and subject to congressional oversight.

Ex ante Congressional-executive agreements expanded dramatically over the course of the 20th Century, driven in large part by an expansive foreign aid program (foreign aid agreements constitute a significant percentage of ex ante congressional-executive agreements).[249] Executive agreements based on delegated statutory power are,

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[248] Ackerman and Golove, 851.

[249] Oona Hathaway, "Presidential Power over International Law: Restoring the Balance," *Yale Law Journal* 119, no. 2 (January 1, 2009).

at least in theory, hardly controversial insofar as Congress has the political tools necessary to influence executive discretion. Some scholars, however, worry that the president has too much power in foreign affairs given the widespread and, at times, overly broad delegations to the executive branch. As Oona Hathaway contends, such delegations essentially grant the executive branch unfettered discretion in foreign affairs, satisfying the form of interbranch cooperation without the substance.[250] Indeed, some delegations, often authorized decades ago, are so broad so as to provide very little meaningful guidance to the executive branch (though other provisions, discussed below, can restrict the scope of these delegations). For example, the Foreign Assistance Act of 1973 states that the President is "authorized to furnish… assistance, on such terms and conditions as he may determine."[251] Similarly, the Mutual Education and Cultural Exchange Act of 1961 granted the executive broad power to conclude "agreements with foreign governments and international organizations, in furtherance of the purposes of this Act."[252] These two examples are typical of the broad and vague delegations that serve as the basis for most executive agreements today.[253]

Of course, the broadness of such delegations is arguably appropriate given that such delegations are meant to be flexible enough to enable the president to respond to events on the ground rather than to tie the president's hands through overly specific legislation (the reason for delegating in the first place). Moreover, open-ended

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[250] Hathaway, "Presidential Power over International Law," 212–15.
[251] Foreign Assistance Act of 1973, Pub. L. No. 93-189, sec. 12(b)(1), S. 503 (a), 87 Stat. 714, 720 (codified at 22 U.S.C. S 2311(a)).
[252] Pub. L. No. 87-256, S 103, 75 Stat. 527, 529 (codified as amended at U.S.C. S 2453 (2012)).
[253] Ryan Harrington, "Understanding the 'Other' International Agreements," 348–49.

delegations are at times essential for long-term planning and investment. For example, prior to the Foreign Assistance Act of 1961, Congress included sunset provisions in its foreign assistance legislation, and, therefore, had to reauthorize foreign aid every few years.[254] In requesting that Congress overhaul the foreign assistance program, President Kennedy argued that "uneven and undependable" short-term delegations undermined efficient long-term planning.[255] Congress thus overhauled the program with longer-term grants of power.

At the end of the day, Congress has substantial power to influence executive discretion through its control over appropriations. It is, of course, difficult for Congress to defund an executive agreement with which it disapproves in order to undercut the agreement. Moreover, to do so could undercut the United States' credibility in foreign affairs because the withholding of funds to implement a particular agreement could mean that the United States is non-compliant with its international obligations.[256] Even so, Congress can scrutinize executive use of delegated authority and alter its funding priorities — or perhaps end the delegation altogether — should the executive branch exercise its authority in ways that defy congressional priorities. This gives Congress substantial power to both harness the benefits of executive energy and discretion in foreign affairs while influencing (though not directly controlling) how that discretion is

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[254] Dianne E Rennack and Susan G Chesser, "Foreign Assistance Act of 1961: Authorizations and Corresponding Appropriations" (Congressional Research Service, July 29, 2011).
[255] Rennack and Chesser.
[256] Hathaway argues that the Congress's power over appropriations is not a sufficient check on the use of such agreements because it is difficult to defund agreements. Asking this particular question, however, obscures the long-term influence the appropriations power can have over the use of executive agreements. Hathaway, "Presidential Power over International Law," 225–30.

used in the long-term, and Congress has, at times, been fairly adept at using the appropriations process to constrain executive discretion with regard to executive agreements.

For example, Congress has often, to great effect, attached appropriation riders to its delegations for foreign aid. As Josh Chafetz notes, since 1986 Congress has attached appropriations riders prohibiting the payment of direct assistance to nations' whose elected head of state was deposed in a military coup.[257] A recent study, moreover, demonstrates that administrations have generally complied, albeit begrudgingly, with this congressional demand.[258] The existence of the appropriations rider, Chafetz contends, has created problems for administrations who do not want to comply. For example, when the Obama administration wanted to avoid cutting off aid to Egypt after the 2013 Egyptian coup, the administration simply refused to characterize the coup as such. Extensive, and negative, media coverage of the issue, however, eventually forced the administration to comply with congressional demands.[259] In addition to this, Congress (through the so-called Leahy Amendment) has used appropriations riders barring foreign aid from groups known to commit human rights violations, generating substantial conflict between the executive branch and Congress.[260] In 2011, 1,766 individuals and

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[257] Chafetz, *Congress's Constitution*, 74.
[258] "CONGRESSIONAL CONTROL OF FOREIGN ASSISTANCE TO POST-COUP STATES," *Harvard Law Review* 127, no. 8 (2014): 2503–9.
[259] "CONGRESSIONAL CONTROL OF FOREIGN ASSISTANCE TO POST-COUP STATES," 2503–9; Chafetz, *Congress's Constitution*, 74.
[260] Eric Schmitt, "Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission," *The New York Times*, June 20, 2013.

units from 46 countries were denied assistance on humans rights grounds.[261] Beyond appropriations riders, moreover, Congress can alter its funding priorities, providing more strict guidance for the executive branch. Lisa L. Martin, for example, demonstrates how in the 1980s Congress substantially altered the Food Aid Program in response to disagreements with the executive branch. Broad delegations, Martin argues, signaled general interbranch agreement on the issue. When the executive branch used that discretion in ways that diverged from congressional expectations Congress responded by narrowing the delegations.[262]

In short, Congress wields substantial powers to oversee the use of executive agreements — especially those executive agreements entered into based on its delegated power — should it choose to use its political capacities in response to the need to delegate. As Gary Schmitt observed in a study of military agreements from 1946-1973, presidential reporting requirements and annual appropriation hearings in each house indicated substantial congressional control of agreements entered into based on statutory delegation. Schmitt concluded that it was perhaps a "misnomer to refer to these accords as *executive* agreements" given the extent to which such agreements ultimately relied upon Congress for their substance.[263] The point here is that this type of executive agreements are not in principle problematic because Congress has all the tools necessary (at least in theory) to ensure that the substance of executive agreements reflects its own

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[261] Schmitt.
[262] Lisa L. Martin, *Democratic Commitments: Legislatures and International Cooperation* (Princeton, N.J: Princeton University Press, 2000), 112–46.
[263] Gary J. Schmitt, "Executive Agreements and Separation of Powers: A Reconsideration," *American Journal of Jurisprudence* 28 (1983): 218.

political priorities and to contest presidential use of its delegated power when the president acts in ways that are inconsistent with those priorities. There are, however, reasons to believe that Congress has not sufficiently used these political capacities. These shortcomings are separate, although not entirely distinct, from the question of whether such agreements are themselves constitutionally appropriate, and will be addressed in a later section.

It should be mentioned that Congress's ability to oversee its delegated powers in foreign affairs has been substantially curtailed by the Court's invalidation of the legislative veto. Given that the legislative veto is the subject of another chapter, there is no reason to dwell on this issue at length here. However, the rise of executive agreements and the legislative veto occurred in tandem (one of the original applications of the legislative veto, in fact, was in the Lend-Lease Act of 1941), with the legislative veto often serving as the price for broad and wide-ranging delegated powers in foreign affairs. While the legislative veto was never successfully used in the foreign sphere, the viable threat of the veto, as I argued in the other chapter, ensured that the executive branch consulted with Congress during the negotiation and formation of international agreements. For example, arms sales under the Arms Export Control Act of 1974 were subject to a legislative veto. Congress only once threatened to use the veto (regarding the sale of Hawk missiles to Jordan). The administration, under intense pressure from Congress, backed down from that particular agreement. In later years, the viable threat of the veto in that incident, however, resulted in much closer consultation with Congress

long before such agreements were finalized.[264] Legislative veto provisions thus ensured that congressional delegations in the foreign affairs context — delegations that, to be successful, were often long-term and broad grants of power to enable sufficient flexibility and long-term planning — did not result in congressional abdication, providing Congress opportunities to assert its political perspective in particular circumstances. As Hathaway argues, many of Congress's long-term delegations in foreign affairs were made precisely because the legislative veto provided Congress with a viable mechanism for continued political influence. The long-term delegations made (often without sunset provisions) are hard to repeal by statute (often facing an executive veto). The invalidation of the veto, in this way, has significantly undercut congressional control of its delegated powers in foreign affairs, and the United States' expanded role in the global arena makes it difficult to walk back such delegations.[265] A strict reading of the branches' powers vis-a-vis each other in terms of lawmaking (in the case of the invalidation of the legislative veto) has thus undermined the political capacities of the branches in an area (international agreement making) where a more expansive notion of constitutional purposes has taken hold.

Sole Executive Agreements

Agreements entered into based solely on the president's constitutional powers are the most controversial international agreements because they are neither mentioned by

[264] Martha Liebler Gibson, "Managing Conflict: The Role of the Legislative Veto in American Foreign Policy," *Polity* 26, no. 3 (1994): 454–55.
[265] Hathaway, "Presidential Power over International Law," 194–205.

the Constitution nor authorized in advance by Congress. Such agreements, however, have been upheld by the Supreme Court and retain a legal status on par with treaties.[266] Scholars estimate that sole executive agreements constitute around 5-10 percent of executive agreements (though, again, this is simply an estimate given data limitations and transparency issues discussed below).[267]

While sole executive agreements are potentially the most controversial because Congress is not formally involved in making them, such agreements fit within the general constitutional framework specified in the previous section. A fundamental reason for constructing a vigorous executive branch with powers derived directly from the Constitution — and thus independent of Congress — was to ensure that the constitutional order would be able to meet the needs of the nation in foreign affairs. Hence, the president at times enters into sole executive agreements related to national security and defense. Sole executive agreements in this area deal with issues such as intelligence sharing, cross-servicing agreements, joint military missions, and training exercises, and, as such, fall squarely within the president's powers as commander-in-chief. All status of forces agreements (SOFAs), which deal with issues pertaining to the legal rights of U.S. personnel stationed abroad, are entered into as sole executive agreements (with the sole exception of the treaty which established NATO, which is perhaps not a surprise given the significance of the commitment). Such agreements, while at times merely routine, can be highly consequential, such as the SOFA and the

[266] See Belmont v. United States and Pink v. United States.
[267] Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law."

"Strategic Framework" for friendship and cooperation that President George W. Bush concluded with Iraq at the very end of his presidency, entering into force on January 1, 2009.[268] The agreement was particularly controversial because it was concluded after the 2008 election but before President Obama entered into office. The executive agreements included a withdrawal timeline that would significantly affect U.S. and Iraqi relations related to the war effort well into the Obama administration.[269] The substantive nature of the two sole executive agreements concluded with Iraq at the end of the Bush administration led some members of Congress (for example, Senator Obama on the campaign trail) and some legal scholars to demand that the agreements be submitted to the Senate for ratification as a treaty.[270] The agreements were implemented without any congressional authorization.

While at times highly significant and controversial, it can be easy to overstate the problems associated with sole executive agreements. While such agreements are entered into based solely on the president's power with no prior authorization or subsequent approval by Congress, sole executive agreements, like agreements based on delegated statutory power, are unlikely to evade separation of powers constraints entirely should Congress exercise its own political prerogatives over foreign affairs. Military and basing agreements, for example, might be concluded as sole executive agreements, but at the end of the day Congress controls the purse strings and can choose to fund or not to fund

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[268] R Chuck Mason, "U.S.-Iraq Withdrawal/Status of Forces Agreement: Issues for Congressional Oversight" (Congressional Research Service, July 13, 2009).
[269] Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law," 1248.
[270] Bruce Ackerman and Oona Oona Hathaway, "An Agreement Without Agreement," February 15, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021502539.html.

bases overseas. By keeping itself apprised of executive action, Congress can place itself in a position to contest presidential use of sole executive agreements. Indeed, all exercises of presidential power related to foreign affairs are ultimately subject to Congress's independent constitutional powers should Congress use its political capacities effectively. As Josh Chafetz notes, Congress's power over the purse give it substantial power even to end wars when troops are already committed on the ground, a feat which Congress accomplished when it passed the Case-Church Amendment in 1973, effectively cutting off all funding, direct and indirect, to the war effort in Vietnam.[271] Sole executive agreements are but a subset of this larger constitutional picture and, as such, they are constrained, at least theoretically, by the larger separation of powers system.

TRANSPARENCY PROBLEMS: A FAILURE OF CONGRESSIONAL OVERSIGHT

Much of what has been written about the use of executive agreements so far has been speculative and theoretical in many respects. The argument has been fairly straightforward: executive agreements do not, in principle, pose major constitutional concerns in light of the principled division of labor embodied by the Constitution's political architecture. Moreover, such agreements do not necessarily mean that the executive branch has exceeded separation of powers constraints because Congress has political capacities that enable it to exercise substantial control of executive agreements regardless of whether those agreements are entered into based on delegated power or solely on the president's own constitutional powers.

[271] Chafetz, *Congress's Constitution*, 74–75.

Exercising those political prerogatives effectively, however, requires that Congress have accurate and up-to-date information about executive agreements. In other words, while it is certainly true that the president is the dominant actor in the negotiation and conclusion of the vast majority of international agreements (without subsequent approval by Congress), Congress has a great deal of power to influence the direction of American foreign policy through the exercise of its political prerogatives vis-a-vis the executive branch. Congress can alter statutory delegations, influence executive discretion through the appropriations process, and even use other political tools up to and including impeachment should the executive branch persist in actions that violate the deliberative will of Congress. Acquiring the relevant information regarding executive exercises of authority, however, is a necessary prerequisite to using these political capacities when the branches disagree. Indeed, it is impossible to have an argument about political differences between the branches if Congress does not know how the executive branch is using its power.

Transparency was the goal of the Case-Zablocki Act of 1972 (also known as the Case Act) which required that the Secretary of State report all international agreements entered into by the United States through mechanisms other than treaties to Congress within 60 days after agreements entered into force.[272] Congress was rightly concerned

[272] S. Rep. No. 92-591, at 3 (1972) ("The bill does not undertake to resolve fundamental ques-tions relating to the treaty power of the Senate and the frequently countervailing claim—or simple use—of executive authority to enter into binding agreements with foreign countries without the consent of Congress. S. 596 undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy.").

that the massive uptick in executive agreements had left it in the dark on major international commitments. Of particular concern were secret agreements that committed the United States to serious international obligations without congressional knowledge or approval. Perhaps the most notable, and controversial, of such agreements was a secret annex to a basing agreement with Spain. In the context of the basing agreement, the United States and Spain noted their mutual security interests and pledged to work within their constitutional processes to take action to preserve their common security interests.[273] While basing agreements were generally concluded as executive agreements — and considered within the purview of the president's power as commander-in-chief — this agreement clearly committed the United States to a more substantive pact. Given this agreement, and others like it, Congress was concerned that the executive branch was essentially acting unfettered in the foreign arena. As the Senate Committee Report for the Case Act stated:

> As the committee has discovered, there have been numerous agreements contracted with foreign governments in recent years, particularly agreements of a military nature, which remain wholly unknown to Congress and the people. A number of agreements have been uncovered by the Symington subcommittee... including, for example, an agreement with Ethiopia in 1960, agreements with Laos in 1963, with Thailand in 1964 and again in 1967, with Korea in 1966 and certain secret annexes to the Spanish bases agreement.[274]

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[273] Gary J. Schmitt, "Executive Agreements and Separation of Powers: A Reconsideration," *American Journal of Jurisprudence* 28 (1983): 203–6.
[274] "Executive Agreements." In *CQ Almanac 1972*, 28th ed., 05-619-05-621. Washington, DC: Congressional Quarterly, 1973. http://library.cqpress.com/cqalmanac/cqal72-1251460.

Given that such agreements could constitute significant commitments on the part of the United States, Congress asserted its need to know what those commitments could entail: "...these agreements, which can in an instant commit or involve this country in possible hostilities, must be formally and systematically examined by the Congress before they are triggered by events."[275] Even so, Congress acknowledged that the executive branch had good reasons, at times, for keeping certain agreements secret, especially from the public, and, therefore, created mechanisms for specialized committees to review such agreements rather than the whole of Congress. Under the provisions of the Case Act, the Senate Foreign Relations Committee and the House Foreign Affairs Committee receive the agreements and can then follow up with questions or criticisms, or hold closed-door hearings.[276] The need for secrecy, however important, could not be a pretext for keeping Congress — or portions of Congress — completely in the dark about U.S. commitments. As Senator Case (for whom the Act is named) argued:

> The most important purpose of this legislation is to make the American people aware of what our international relationships are on a continuing basis, for two reasons. First, so that the public, where those arrangements are sound and the direction of policy is wise, can support it . . . . Second, so that the administration from time to time is checked in its efforts to do things that are unwise by the force of public opinion on a continuing basis.[277]

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[275] Ibid.

[276] One scholar recently estimated that the United States is a party to 1000-1800 secret (classified) agreements. Ashley S. Deeks, "A (Qualified) Defense of Secret Agreements," *Arizona State Law Journal* 49 (2017): 713–94.

[277] Quoted in Ashley S. Deeks, "A (Qualified) Defense of Secret Agreements," *Arizona State Law Journal* 49 (2017): 713–94, 775, n.273.

Unfortunately, the accountability regime embodied by the Case Act has hardly lived up to its aspirations.[278] First, there are major problems regarding executive branch compliance with the terms of the Case Act. While agreements are supposed to be reported to Congress within 60 days after they enter into force, reporting is "often late and perpetually incomplete."[279] For example, in 2004 the House Committee on International Relations learned that more than 600 classified and unclassified agreements dating back to 1997 had not been reported to Congress due to organizational failures at the State Department.[280] Many of the reporting failures are due to a lack of centralized planning resulting from, at least in part, the fact that the Federal Register Act has excluded the reporting for international agreements since its inception in 1934 (a point to which I will return). The State Department maintains that the backlog in the organization and reporting of agreements is due in part to a lack of funding and resources.[281] Perhaps even more problematic is the fact that the State Department is not itself always aware of all of the agreements concluded by other departments and agencies (especially since the reporting to the State Department is often late) and a great deal of confusion at times exists within the executive branch about the nature of American commitments. For example, in 1999

[278] Much of the information reported in this section comes from Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law," 1270–97; Curtis A. Bradley, Jack L. Goldsmith, and Oona Hathaway, "Executive Agreements: International Lawmaking Without Accountability?," *Lawfare* (blog), January 9, 2019, https://www.lawfareblog.com/executive-agreements-international-lawmaking-without-accountability; Ryan Harrington, "Understanding the 'Other' International Agreements," 352–53.
[279] Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law," 1274; Ryan Harrington, "Understanding the 'Other' International Agreements," 352–53.
[280] CONG. REC. H11026 (daily ed. Dec. 7, 2004).
[281] See: "Publication of TIAS," accessed February 15, 2019, https://www.state.gov/s/l/treaty/tias/pubtias/. (Noting that "funding to continue producing UST has been problematic in recent years.").

the General Accounting Office reported that "[t]he number of trade agreements to which the United States is currently a party is uncertain" and that "key agencies were unable to provide a definitive count of all U.S. trade agreements that are currently in force."[282] Moreover, a report from the International Security Advisory Board maintained as recently as 2015 that because there is no "comprehensive and readily accessible archival database of all existing agreements… there is a surprising degree of uncertainty about what status agreements are in force and their terms."[283] The report further asserted that "[i]n some cases, different parts of the U.S. government disagree about whether agreements exist with a particular nation, whether agreements are still in force, and what their terms are."[284] While Congress amended the Case Act in 2004 to bring about greater executive branch compliance, major compliance issues persist, as Curtis Bradley and Jack Goldsmith recently noted, "and the result in practice is that Congress lacks a full picture of U.S. agreements, and the public (including those in the public who have the incentive and ability to monitor the government) has highly selective access to these agreements and little ability to perceive the overall agreement practices of the executive branch."[285]

Beyond the issues with executive branch reporting under the Case Act, Congress has not acted to ensure that information about executive agreements is made available to the public in easily accessible ways. Pursuant to the Case Act, a list of all non-classified

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[282] "International Trade: Improvements Needed to Track and Archive Trade Agreements" (United States General Accounting Office, December 1999), 4, https://www.gao.gov/assets/230/228531.pdf.
[283] "Report on Status of Forces Agreements" (International Security Advisory Board, January 16, 2015), 39, https://www.state.gov/documents/organization/236456.pdf.
[284] Ibid.
[285] Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law," 1274–75.

international agreements are supposed to be posted to the State Department website no later than 180 days after entering into force (although, as mentioned above, the reporting of these agreements is never up-to-date or complete).[286] Even when agreements are posted online, the State Department only posts the *texts* of agreements and does not cite the legal authority by which agreements were made. While the State Department, through its Circular-175 procedure, makes a determination about the legal basis for agreements when deciding whether an agreement is authorized by statute or needs to be concluded as a treaty (or with some form of congressional ratification), these determinations are never released to the public even though they are rarely classified.[287] Different types of executive agreements (ex ante congressional-executive agreements and sole executive agreements) are thus posted without distinction. Hence, it is nearly impossible for researchers — and, for that matter, average citizens — to determine whether the executive branch has exceeded its legal authority in the conclusion of executive agreements, or even whether executive agreements have any legal basis at all.[288]

It should be noted that this lack of governmental transparency has not always been the norm. For example, when Gary Schmitt conducted his research into executive agreements in the early 1980s he relied upon a government source that listed all executive agreements with their legal citations through the 1960s (excluding classified

[286] See, for example, a list of international agreements concluded in 2018: "2018 Treaties and Agreements," accessed February 16, 2019, https://www.state.gov/s/l/treaty/tias/c78676.htm.
[287] Ryan Harrington, "Understanding the 'Other' International Agreements," 352.
[288] Harrington discusses the dilemmas for researchers attempting to determine the legal basis for executive agreements. Ryan Harrington, 352–53.

agreements).[289] Determining the legal basis for executive agreements today (if one can find agreements in the first place), however, requires considerable guesswork. While scholars estimate, for example, that executive agreements based on statutory delegations comprise 80-85 percent of executive agreements, this estimate involves connecting executive agreements to statutes by conducting keyword searches in the statutes-at-large.[290] Obviously, this is a fraught and painstaking process. In one of the more recent comprehensive studies of executive agreements, Oona Hathaway and her research assistants searched the statutes-at-large database and connected executive agreements to statutes in nearly every issue area conceivable.[291] For example, by searching the statutes-at-large for "agriculture" or "agricultural commodities" in the same sentence as "agreements" Hathaway was able to find 167 agreements, most of which were pursuant to the Agricultural Trade and Development and Assistance Act of 1954.[292] Much of the work here, however, is speculative, and is prone to error.

Moreover, the Case Act only requires the executive branch to report *legally binding* international commitments.[293] The United States, however, increasingly enters into "political" agreements, whereby both nations disclaim any intention to form a legally

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[289] United States Department of State Office of the Legal Adviser for Treaty Affairs, *International Agreements Other Than Treaties 1946-1968: A List Noting Their Legal Bases and Their Possible Effect on Internal Law in the United States* (The Department of State, 1969); Schmitt, "Executive Agreements and Separation of Powers," 197 n. 32.
[290] Ryan Harrington, "Understanding the 'Other' International Agreements," 357–58.
[291] Hathaway, "Treaties' End," 1260. (Finding statutory authorizations for agreements ranging from agriculture to space cooperation).
[292] Hathaway, 1268. N. 76; Ryan Harrington, "Understanding the 'Other' International Agreements," 358.
[293] Ryan Harrington, 353.

binding instrument, even as they commit to do certain things.[294] Such agreements are neither reported to Congress nor publicized, though such agreements can have significant consequences for the public. As Bradley and Goldsmith maintain, such political commitments have been used especially prominently in regulatory contexts in order to facilitate greater cooperation between U.S. bureaucratic agencies and their foreign counterparts, and these agreements, although not legally binding, "can have an enormous impact on the everyday activities of U.S. firms and persons."[295] Moreover, such agreements are being used increasingly for important international commitments. Indeed, two of the most prominent international commitments concluded during the Obama Administration — the nuclear deal with Iran and the Paris Climate agreement — were "political" agreements, and thus did not impose legally-binding commitments under international law. These types of "political" commitments, as Harold Koh argues, are increasingly becoming the norm in international lawmaking as international affairs becomes less about drafting static texts and more of "a process of building relationships to foster normative principles in new issue areas."[296] As such "political" agreements proliferate and have significant impacts on U.S. foreign policy and the regulatory regimes

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[294] Ryan Harrington, 353; Duncan B. Hollis and Joshua J. Newcomer, "'Political' Commitments and the Constitution," *Virginia Journal of International Law* 49, no. 3 (2009): 507–84.

[295] Jack L. Goldsmith and Curtis A. Bradley, "Presidential Control Over International Law," 1218–19. Goldsmith and Bradley cite several examples. The Federal Reserve Board uses political commitments to coordinate capital requirements and other banking rules with foreign bank regulators. Similarly, the Federal Trade Commission uses political commitments for a variety of issues such as bilateral trust cooperation and multilateral commitments to fight spam. The Food and Drug Administration makes political commitments on issues such as the safety of medical products and the opening of markets to U.S. food manufacturers. Examples such as these could be multiplied.

[296] Koh, "Triptych's End," 367.

that impact the daily lives of Americans, Congress has not acted to ensure that such commitments are publicly recorded and made known in any systematic way.

This transparency regime for executive agreements (to the extent that it exists) contrasts significantly with the administrative state where both proposed and final rules and regulations — pursuant to the Administrative Procedure Act (APA) of 1946 — are catalogued and listed in the *Federal Register*, allowing time for agencies to hold open proceedings where members of the public can comment on proposed rules and regulations prior to the finalization of rules. As David Rosenbloom argues, Congress, when debating the APA, recognized that bureaucratic departments and agencies operate as mere extensions of Congress when they issue rules and regulations based on delegated legislative power.[297] To address the constitutional and accountability problems associated with delegation of legislative power to the executive branch, Congress developed mechanisms meant to bring legislative values to the rule-making process by requiring that information about rules and regulations — including their legal basis and general applicability — is public.[298] By requiring the publication of this information, Congress thus provides opportunities to take public views into account in the formation of rules and regulations. The Federal Register Act similarly requires that various executive actions,

[297] David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa: University of Alabama Press, 2000).

[298] Under the APA, agencies provide notices of proposed rulemaking, substantive rules and interpretations of general applicability, statements of general policy, rules of practice and procedure, descriptions of agency forms, rules of organization, descriptions of an agency's central and field organization, and amendments or revisions to the foregoing. See 5 U.S.C. S. 552(a)(1).

such as presidential proclamations and executive orders be published in the *Federal Register*.

Perhaps most importantly, this record enables citizen and media watchdog groups to raise awareness when the executive branch acts in ways that are potentially problematic, giving Congress the opportunity to respond to executive actions with which it disagrees. Indeed, given the volume of administrative action today it is impossible for Congress to oversee every executive or administrative action. Neither would such micromanagement necessarily lead to better oversight given that this would require Congress to spend a great deal of time addressing potential executive non-compliance that is not publicly salient, and, moreover, given the scale of the national agenda, would likely miss many instances of executive discretion with which it disagrees. By providing a record of executive branch action, on the other hand, Congress can engage in what Matthew D. McCubbins and Thomas Schwartz refer to as "fire-alarm" oversight.[299] An informational record available to the public, in short, enables concerned citizens and watchdog groups to bring potential abuses of executive discretion to the attention of Congress, giving it opportunities to respond.

International agreements have been excluded from publication in the *Federal Register* since publishing began in 1934. This is perhaps not surprising given that such agreements were used sparingly at the time. While Congress has enacted informational reforms with the Case Act since that time, these reforms, as demonstrated, have never

[299] Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28, no. 1 (1984): 165–79; Jack L. Goldsmith and Curtis A. Bradley, "Presidential Control Over International Law," 1284-1285.

been in any way comparable to the vast informational resources created by the APA and the Federal Register Act in the domestic sphere. The *Federal Register*, published daily, is voluminous. In 2016, it included 3,853 final rules constituting 38,652 pages.[300] This, of course, does not include the lists of proposed rules. By contrast, the United States enters approximately 300-400 international agreements per year, and yet the information regarding these commitments is difficult to find (given major reporting problems), and, when reported, is reported without relevant — and, indeed, essential — information (such as the legal authorization).

In the absence of a publicly available, and easily accessible, informational record, Congress and the public are left uninformed about the nature of U.S. commitments entered into by the executive branch. The lack of such information, moreover, makes it difficult for citizens to raise controversial issues to the attention of Congress, thus making oversight of executive agreements all the more difficult. While executive agreements, as I have argued, are theoretically justifiable given the institutional advantages of the executive branch in foreign affairs, executive predominance in foreign affairs (and the concomitant rise in executive agreements) is ultimately reconciled to the aims of republican governance by the exercise of Congress's distinctive political capacities vis-a-vis the executive branch, political capacities, moreover, that can only be exercised effectively if Congress has sufficient information about executive actions to respond. In other words, if Congress is to effectively wield its powers of the purse, for example, in

[300] Clyde Wayne Crews, Jr., "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State" (Competitive Enterprise Institute, 2017), 3, https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf.

response to executive actions it deems inappropriate (inappropriate either for legal or political reasons), information about those executive actions is a prerequisite for exercising those prerogatives.

Events during the Obama administration highlighted why the current transparency regime for international agreements is inadequate. The Obama administration frequently employed a legal theory justifying executive agreements that were not directly authorized by a specific statute, but, nevertheless, were consistent with the tapestry of existing law and, moreover, could be implemented, according to the administration, without subsequent legislation.[301] Some legal scholars have characterized such executive agreements as "executive agreements plus."[302] Perhaps most controversially, the Obama administration announced that it intended to ratify the Anti-Counterfeiting Trade Agreement (ACTA) without seeking ratification by Congress. The administration, however, only provided vague explanations for why it had the authority to enter the ACTA as a sole executive agreement.[303] While the administration argued that the agreement would not require any changes to existing law, many members of Congress and large swaths of the legal community objected to the administration's decision to ratify the ACTA without congressional approval, arguing that the administration did not have

[301] As Legal Advisor for the State Department from 2009-2013, Harold Koh has been the most prominent advocate for this approach. See: Harold Koh, "Address: Twenty-First-Century International Lawmaking," *Georgetown Law Journal* 101, no. 3 (March 2013): 725–48; Koh, "Triptych's End."
[302] Peter Spiro and Daniel Bodanski, "Executive Agreements +," *Vanderbilt Journal of Transnational Law* 49, no. 4 (October 2016): 885–929. For example, the Obama administration ratified the Minamata Convention on Mercury even though the law that it cited for the agreement's legal basis did not expressly authorize the administration to make international agreements based on the law.
[303] Jean Galbraith, "INTERNATIONAL LAW AND THE DOMESTIC SEPARATION OF POWERS," *Virginia Law Review* 99, no. 5 (2013): 1040.

legal authority to conclude the agreement without Congress.[304] The administration ultimately argued that it had the authority to conclude the agreement based on the Trade Act of 1974, although this law did not delegate to the administration the power to conclude agreements without congressional approval.[305] While the administration never renounced its legal position, it never ratified the agreement in the face of political pressures.[306]

This example highlights the extent to which the executive branch has at times seemed to stretch the limits of its authority in defense of the legal basis for certain agreements. The ACTA was a particularly controversial agreement and, as such, attracted the attention of Congress and the legal community. It is certainly possible that there are other examples of agreements made with tenuous legal authority. Absent a better transparency regime, however, it is difficult to know whether the executive branch is routinely exceeding its legal authority or entering agreements in ways that defy the political preferences of Congress. By building a more robust accountability regime that requires the executive branch to list all international agreements and to make legal justifications for them — akin to reporting requirements under the APA — Congress could lay the foundations for effective oversight by ensuring that the public is aware of

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[304] Jack Goldsmith and Lawrence Lessig, "Jack Goldsmith and Lawrence Lessig - Anti-Counterfeiting Agreement Raises Constitutional Concerns," March 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html; Oona Hathaway and Amy Kapczynski, "Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement," *The American Society of International Law: Insights* 15, no. 23 (August 24, 2011), /insights/volume/15/issue/23/going-it-alone-anti-counterfeiting-trade-agreement-sole-executive.

[305] Sean Flynn, "ACTA's Constitutional Problem: The Treaty Is Not a Treaty," *American University International Law Review* 26, no. 3 (2011): 922; Ryan Harrington, "Understanding the 'Other' International Agreements," 352.

[306] Peter Spiro and Daniel Bodanski, "Executive Agreements +," 910.

executive action. Ensuring that the public has access to relevant information, moreover, provides Congress with opportunities to assess and respond to executive exercises of discretion in foreign affairs.

Finally, such informational reforms are more appropriate to the foreign affairs context than more stringent administrative requirements. Oona Hathaway, for example, has advocated for all proposed international agreements (especially ex ante congressional-executive agreements) to be reported to Congress prior to entering into effect and subject to APA procedures, such as open comment proceedings.[307] Such administrative requirements, however, would be particularly onerous, and, moreover, they elide the differences between domestic and foreign affairs. While Congress has subjected rulemaking in the administrative context to stringent controls meant to ensure that the binding rules and regulations are made pursuant to the public good, such controls make sense where the rulemaking being controlled is Congress's delegated legislative power. To apply such requirements in the international context, however, would risk undermining the executive branch's particular institutional advantages for secrecy and dispatch, especially for sensitive agreements. Moreover, such requirements would be far more onerous in foreign affairs than in domestic policy-making because it would mean that the president would have to negotiate with both Congress and foreign counterparts, making the conclusion of agreements far more difficult.

[307] Hathaway, "Presidential Power over International Law," 239–66.

In short, ensuring transparency by requiring that agreements be posted with legal justifications would better enable Congress to perform its oversight function while preserving the benefits of executive vigor and energy in foreign affairs. Given that the executive branch is designed to summon the nation's strength and effectiveness in foreign affairs, the rise of executive agreements does not in principle signal constitutional subversion. Rather, executive dominance is the outworking of a principled constitutional commitment. The major problem with executive agreements, as this section has demonstrated, is not executive dominance, but, rather, the failure of Congress to effectively mobilize its political capacities in response to the natural evolution of the executive branch's power in foreign affairs as the international arena has taken a larger role in the national government's agenda. It is true that the absence of information about executive agreements today makes it impossible to claim that the executive branch is routinely entering into illegal or otherwise bad agreements in ways that contravene the deliberative will of Congress. However, the lack of available information about executive agreements itself demonstrates a congressional failure to adequately supervise executive branch actions. This abdication makes such executive subversion of constitutional principles more likely by undermining the effective exercise of Congress's political prerogatives.

CONGRESSIONAL INVOLVEMENT IN INTERNATIONAL AGREEMENTS

While executive agreements, as I have argued, are to be expected given the structural advantages of the executive branch in foreign affairs, the use of executive

agreements cannot be endlessly malleable if the constitutional order is to maintain its basic character. Under the Constitution the Senate retains significant oversight of treaties with its power to ratify them by the consent of two-thirds of the Senators present. Returning to *Federalist* 75, Hamilton notes the logic of this arrangement by pointing out the fact that treaties, while requiring the institutional capacities of the executive branch to ensure effectiveness in foreign affairs, also "plead strongly for the participation of the whole or a portion of the legislative body in the office of making them" because treaties operate as laws and are thus binding on citizens.[308] In other words, while the need for vigor and dispatch would seem to require placing the power to make treaties solely with the executive branch as Locke and Montesquieu had urged, the framers departed from these separation of powers theorists, recognizing the importance of enhanced congressional involvement in treaty-making to ensure that treaties, because of their status as law, reflect the deliberative will of the people expressed by their representatives in Congress. The Treaty Clause, in this regard, ultimately brings the branches into a productive conflict over the nation's involvement in foreign affairs. Shared powers over treaty-making, in short, is both about creating an institutional framework that is effective in foreign affairs by harnessing the institutional advantages of the executive branch while also ensuring that the government's success in foreign affairs is made consistent with the aims and purposes of republican government.

[308] Hamilton et al., *The Federalist Papers*, 499.

Of course, given the scale of the nation's involvement in foreign affairs, it would be impossible for the Senate to ratify all international agreements as treaties. "Processing such a workload through the Article II process," as Glen Krutz and Jeffrey Peake argue, "would grind the presidential-congressional system to a halt, at least in regard to foreign policy, at both ends of Pennsylvania Avenue."[309] Much of this chapter, therefore, has considered how the rise of *executive* agreements was anticipated by the Constitution's principled division of labor and how Congress can use its political capacities to constrain agreements. This section is concerned with a separate, albeit closely connected, question: what political criteria, deduced from the animating purposes of the Treaty Clause, should guide the branches' political negotiations about the level of congressional authorization certain agreements ought to take? In other words, how should Congress understand its role in the formation of international agreements, asserting its institutional prerogatives in ways that realize underlying constitutional values? This question, moreover, is more fundamental than whether a particular agreement is legal. Indeed, Congress can assert its political prerogatives in ways that fail to achieve its constitutional purposes even as, legally speaking, it provides authorization for a particular agreement (as in the Iran Agreement, which will be discussed below). Understanding the Treaty Clause politically, in short, does not mean that any political resolution the branches come up with is rightly characterized as a healthy instance of constitutional politics.

[309] Glen S. Krutz and Jeffrey S. Peake, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (Ann Arbor: University of Michigan Press, 2009).

In order to elucidate the underlying purposes of the Constitution's treaty-making architecture, it is necessary to examine the best reasons for placing the power to ratify treaties in the Senate rather than in the Congress as a whole. Highlighting this choice, and the framers' overarching purposes in making it, helps to clarify the kind of politics it was intended to inspire. In other words, the primary task is to understand what is signified by the logic of placing the power to ratify treaties in the Senate and how the purposes underlying this decision should inform how the branches negotiate their boundaries in a world where it would be impossible to conduct all agreements as treaties.

Although there was considerable disagreement about whether both houses should have a role in ratifying treaties — with notable members of the Convention such as James Madison and James Wilson, for example, both repeatedly arguing in favor of the involvement of the House — the Convention ultimately chose to place the power to ratify treaties solely in the Senate. The Senate, as a smaller chamber of older, wiser statesmen elected by state legislatures, would serve longer terms than members of the House, giving senators, according to Jay in *The Federalist*, "sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them."[310] Given that treaties can potentially take a long time to negotiate, and given the complexity of national affairs more generally, placing the power to ratify treaties in a more stable legislative body would thus enable members to take the long

[310] Hamilton et al., 390.

view in foreign affairs and, consequently, make it more likely that the good of the nation was met in foreign affairs. As Hamilton further explained in *Federalist* 75:

> The fluctuating and, taking its future increase into the account, the multitudinous composition of that body [the House of Representatives], forbid us to expect in it the qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous.[311]

The framers' choice to place the power to ratify treaties in the Senate, therefore, points to an underlying concern that the United States enters into international agreements credibly because they enjoy widespread and stable public backing.

As is made clear in *The Federalist*, one of the great dangers of republican government, generally speaking, is mutability of the laws, and while it is good for government to be responsive to public opinion, "a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success."[312] The Senate, therefore, was intended, in general, to guard against mutability of the laws, ensuring that adequate provision is made for the long-term good of the nation, not just the short-term and elusive notions of the people more likely to be expressed by the House of Representatives given its proximity to the people because of its larger size and more

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[311] Hamilton et al., *The Federalist Papers*, 451.

[312] Hamilton et al., *The Federalist Papers*, 378. In Federalist 62, Madison provides several reasons for why mutability of the laws is bad in general. First, mutability of the laws, due to a constantly changing legislature, will make laws to voluminous and incoherent to be known and understood by the public. Secondly, such mutability gives the rich and enterprising an unfair advantage because they have the resources to know the law and to consider its long-term effects. Third, mutability of the laws undermines efficient business and commerce which relies on stability in the laws that determine taxes, interest rates, and economic conditions. Finally, too much mutability destroys reverence for the law in general.

frequent elections. While it is true that the House of Representatives is a far more stable body today, with members serving in office, on average, as long as members of the Senate,[313] it bears repeating that the reasons underlying the choice for including the Senate as opposed to the House are more important than the specific institutional instantiation of the larger constitutional commitment and the kind of politics signified by the choice.

The dangers of mutability of the laws, while problematic for republican government in general, are especially pronounced in the foreign arena where a lack of constancy undermines the trust of foreign nations. As Madison argued in *Federalist* 62, commenting on the ways in which a Senate would buttress the credibility of the United States among foreign nations:

> An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once by all prudent people as a speedy victim to his own unsteadiness and folly. His more friendly neighbors may pity him, but all will decline to connect their fortunes with his; and not a few will seize the opportunity of making their fortunes out of his. One nation is to another what one individual is to another; with this melancholy distinction, perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage of the indiscretions of each other. Every nation, consequently, whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of its wiser neighbors. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.[314]

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[313] William T Egar and Amber Hope Wilhelm, "Congressional Careers: Service Tenure and Patterns of Member Service, 1789-2019" (Washington, D.C: Congressional Research Service, January 3, 2019). The average service for members of the House of Representatives in the 116th Congress is 8.6 years versus 10.1 years for members in the Senate.

[314] Hamilton et al., 378–79.

The ultimate choice to place the power to ratify treaties in the Senate, therefore, points to the importance that major foreign policy commitments enjoy widespread support of the public at large. Such widespread support among the public is necessary, moreover, to ensure that important international agreements can be entered into credibly and that the nation will not abandon such agreements based on momentary, and at times fleeting, changes in public opinion. At least in theory, therefore, the high threshold required for Senate ratification is not primarily intended to make agreements more difficult to enter — a mere instance of checks and balances — but, rather, to ensure that the agreements entered into by the United States are done so in ways that have the backing of the public, and, consequently, are durable enough to win the respect of foreign nations.

This, moreover, as alluded to by Madison in the above quotation, was a central concern of the Constitutional Convention. Indeed, one of the major problems of governmental practice under the Articles of Confederation was the inability of the United States to keep its treaty obligations because the national government could not enforce state compliance.[315] The trust of foreign nations was thus undermined, making it more likely that other nations would, in turn, fail to uphold their own obligations towards the United States. Part of the problem under the Articles was that treaties were not considered supreme law of the land and, perhaps more centrally, the national government did not have adequate enforcement mechanisms to ensure state compliance. The task for the

[315] Frederick W. Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (Baton Rouge: Louisiana State University Press, 1973), 3–15.

constitutional framers, therefore, was to create the conditions for effectiveness in foreign affairs by unleashing the vigor of an adequately structured executive branch while also ensuring that there was sufficient public support for international agreements to make those commitments credible. Such public support, moreover, is especially important in a republican government where the president, while originally perpetually eligible for re-election, would ultimately serve at the pleasure of the people. Because the Senate is better constituted to channel the long-term, deliberative will of the people, its support is thus particularly important to ensure the credibility of the nation without a hereditary monarch. The choice to have the backing of a supermajority of the Senate, therefore, was meant to ensure that the United States' important foreign policy commitments are not quickly, and imprudently, jettisoned when, for example, a president from a different political party takes office, or after a wave-election in the House of Representatives. The Senate's distance from the people thus allows, at least in theory, for more reflection — time for "cooler heads to prevail" — leading to more stable support for major international commitments.

While in modern practice lower forms of authorization are, at least legally-speaking, considered to be constitutionally legitimate (such as ex post congressional-executive agreements that require authorization by a majority vote in both chambers rather than the supermajoritarian requirement in the Senate),[316] presidents, following this logic, have routinely brought important international agreements to the Senate for

[316] See Restatement (Third) Foreign Affairs Law of the United States § 303 (1987).

ratification to signal the credibility of the agreement even though — or, rather, because — the Senate process is far more cumbersome than other post hoc approval mechanisms. As Lisa L. Martin argues, presidents have to consider how the form an international agreement takes signals the durability of the agreement.[317] Foreign nations are going to be suspicious of the durability of an agreement if it appears that it is conducted with a lower form of authorization because it does not have sufficient support in Congress. This, of course, has been borne out in practice as foreign nations have at times publicly urged that agreements be concluded as treaties for the very reason that treaties, because they are concluded with a stronger form of authorization, are considered to represent a more durable commitment on the part of the United States.[318] For example, when the United States and Russia negotiated what became the Strategic Offensive Reduction Treaty (SORT) in 2002, there was some question about what form the new arms control

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[317] Lisa L. Martin, "The President and International Commitments: Treaties as Signaling Devices," *Presidential Studies Quarterly* 35, no. 3 (September 2005): 440–65; Similarly, Julian Nyarko demonstrates that treaties generally last longer than executive agreements. See: Julian Nyarko, "Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements," *American Journal of International Law* 113, no. 1 (January 2019): 54–89.

[318] Hathaway, "Treaties' End." Some scholars, like Oona Hathaway, argue that it is wrong to assume that treaties — because of their supermajoritarian requirement in the Senate — create better and more durable international agreements. Hathaway argues that it is impossible to know whether the consensus required for majority votes in both houses (as is done with ex post congressional-executive agreements) is really less durable than what is required for treaties. Hathaway assumes that majority support in both houses requires significant consensus. Moreover, such agreements, she argues, are self-executing since they are enacted as federal laws, whereas treaties, according to the Supreme Court, are not necessarily self-executing and often require subsequent legislation to implement their terms. Ex post congressional-executive agreements, therefore, have the added advantage of bringing the United States fully into compliance with international obligations. Moreover, because it is generally understood that presidents can exit treaties without congressional consent, Hathaway argues that ex post congressional-executive agreements are more durable because they are essentially passed as statutes which, consequently, require both branches to abrogate. My purpose here is not to dispute Hathaway, whose arguments I find generally compelling, but to point to the constitutional concern that important foreign policy decisions have sufficient congressional buy-in to be durable. While Hathaway thinks that mechanisms other than treaties — in all instances where she believes such instruments are constitutionally appropriate — better accomplish this goal, she is ultimately motivated by a concern for durable commitments.

agreement would take. President George W. Bush favored a more flexible "gentlemen's agreement" rather than a full-blown treaty. Russian President Vladimir Putin, on the other hand, wanted to ensure that any agreement reached would bind subsequent administrations and that, therefore, the accord needed to be concluded as a treaty. The Senate, moreover, concurred, asserting its prerogatives to ratify arms control agreements as treaties given the importance of such commitments for American foreign policy.[319]

The point here is that the logic undergirding the Senate's inclusion in the Treaty Clause points to a constitutional good that a stable and deliberative body brings to the practice of foreign affairs, ensuring both that the international commitments entered into by the United States — which attain the status of laws — enjoy the widespread support of the public, and, consequently, enable the United States to form credible commitments internationally. If such stability is a constitutional good, moreover, then executive agreements cannot be used for any agreement if the constitutional order is to maintain its basic character. In other words, there should be a qualitative difference between what is acceptably concluded as some form of executive agreement compared to those agreements which require more stringent congressional scrutiny and a higher form of congressional authorization based on the significance of the international commitment. There is, however, no way to deduce a specific line, in a legalistic sense, demarcating when an agreement should be concluded as one form or another, and the judiciary has

[319] David E. Sanger, "Nuclear Arms Treaty: The Accord; Bush and Putin to Sign Pact to Cut Nuclear Warheads; Weapons Can Be Stockpiled," *The New York Times*, May 14, 2002, sec. World, https://www.nytimes.com/2002/05/14/world/nuclear-arms-treaty-accord-bush-putin-sign-pact-cut-nuclear-warheads-weapons-can.html; Lisa L. Martin, "The President and International Commitments: Treaties as Signaling Devices."

been highly reticent to enter the fray, asserting lack of judicial competence to issue such a bright-line rule.[320] Such decisions, rather, are appropriately left to political negotiation between the branches. For that negotiation to be appropriately characterized as *constitutional* politics, however, it must be tethered to legitimate constitutional claims deduced from the animating purposes of the Treaty Clause. Hence, it is possible to evaluate the ways the branches engage each other politically, assessing the types of arguments the branches make as well as how well those branches use their distinctive governance capacities vis-a-vis each other in service of their larger constitutional arguments and purposes.

There are many examples of Congress — and especially the Senate — protecting its institutional prerogatives, demanding that the president submit international agreements to the Senate to be ratified as treaties. The Senate has exercised its prerogatives, moreover, regardless of the partisan dynamics between the branches. Indeed, the Senate considers some issue areas — such as arms control and human rights — to be sufficiently important and, consequently, demands that such agreements be concluded as treaties rather than agreements with a lower threshold of authorization. For example, since World War II presidents have submitted nearly every arms control treaty to the Senate for ratification. Such agreements are highly consequential because they have established the United States nuclear deterrence strategy of "mutually assured destruction," sought to restrict the spread of nuclear weapons, and led to the

[320] See *Made in USA Foundation Inc. v. United States* (2001).

demilitarization of Europe.[321] The one major exception to this general practice was the 1972 SALT I agreement, which was concluded as a congressional-executive agreement. This agreement, however was considered a temporary agreement (only lasting for five years), and both sides understood that the agreement was a placeholder until a more substantive treaty could be concluded at a later date.[322] When SALT II faced considerable political opposition from Congress, President Carter considered submitting the agreement to both houses to be approved by majority vote rather than as a treaty, but was forced to submit the agreement as a treaty after sustained Senate pressure.[323] Similarly, as previously mentioned, President George W. Bush attempted to conclude the Strategic Offensive Reduction Treaty (SORT) as a congressional-executive agreement, but submitted the agreement as a treaty after considerable pressure from both Russian President Vladimir Putin and members of the Senate.[324] Finally, while the United States signed the Comprehensive Nuclear Test Ban Treaty (CTBT) during the Clinton administration, the treaty has not been ratified by the Senate. Although the treaty (which had majority support in Congress) stalled out in the Senate, neither Presidents Clinton nor Obama considered submitting the agreement to Congress as anything other than a treaty given congressional sentiment on the matter. Indeed, the Senate has consistently asserted its political prerogatives over arms control agreements, attaching a declaration to arms

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[321] John C. Yoo, "Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements," *Michigan Law Review* 99, no. 4 (2001): 804–5.
[322] Yoo, 805.
[323] Bradley and Morrison, "Historical Gloss and the Separation of Powers," 474; Phillip R. Trimble and Jack S. Weiss, "The Role of the President, the Senate and the Congress with Respect to Arms Control Treaties Concluded by the United States," *Chicago-Kent Law Review* 67, no. 2 (June 1991): 661–62.
[324] Krutz and Peake, *Treaty Politics and the Rise of Executive Agreements*. (need page cite).

control treaties in several instances stating that agreements "that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner [should be concluded] only pursuant to the Treaty Power as set forth in Article II, Section 2, Clause 2 of the Constitution."[325] The Senate has insisted that treaties be used in other areas as well, including human rights accords, political/military agreements, environmental agreements, and extradition. Such agreements, in other words, are concluded as treaties because the Senate demands it. The Senate's demands, moreover, are political demands, especially given that many contend that such agreements can and should be appropriately concluded as congressional-executive agreements given the difficulty of securing Senate ratification.[326] Moreover, the consensus of the legal community is that congressional-executive agreements are legally interchangeable with treaties.[327] It is beyond the scope of this chapter to wade into the interchangeability debate other than to note that the Senate's repeated demands that important agreements be submitted to the Senate for ratification, in practice, contradicts this general scholarly consensus. As Bradley and Morrison conclude, "historical practice

[325] Curtis A. Bradley, Jack L. Goldsmith, and Oona Hathaway, "Executive Agreements," 474. (Quoting Senate Executive Report No. 102-22 (1991)).
[326] See generally, Edward S. Corwin, *The Constitution and World Organization*, American Civilization Program Series (Princeton, N.J: Princeton University Press, 1944); Hathaway, "Treaties' End."
[327] See Restatement (Third) of Foreign Relations Law § 303 (1987): "The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty in every instance." See also: Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed (New York: Oxford University Press, 1996), 217: "[I]t is now widely accepted that the congressional-executive agreement is available for wide use, even general use, and is a complete alternative to a treaty." See generally, Hathaway, "Treaties' End"; Myres S. McDougal and Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II," *The Yale Law Journal* 54, no. 3 (1945): 534–615.

suggests a constitutionally salient distinction between 'major' and 'minor' agreements."[328]

It should be noted, moreover, that when the United States uses ex post congressional-executive agreements instead of treaties for major international commitments, it does so in limited contexts that, with few exceptions, lie within Congress's plenary powers pursuant to Article I, Section 8 to regulate trade and foreign commerce. For all the constitutional controversy surrounding ex post congressional-executive agreements,[329] they are, in practice, used sparingly (one per year on average).[330] Of course, such agreements can be highly consequential. Indeed, ex post congressional-executive agreements have been used for major economic agreements such as the World Trade Organization and the Bretton Woods Convention, which "did nothing less than create the foundations of the new world economic order."[331] Moreover, today all major trade agreements, such as NAFTA, are concluded by congressional-executive agreement rather than as treaties. Even so, in areas, such as trade, Congress could just as easily legislate the United States into compliance with the international obligations imposed by

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[328] Bradley and Morrison, "Historical Gloss and the Separation of Powers," 476.

[329] For a debate between Laurence Tribe and Bruce Ackerman and David Golove, see generally, Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," *Harvard Law Review* 108 (1995 1994): 1221–1303; Bruce A. Ackerman and David Golove, *Is NAFTA Constitutional?* (Cambridge, Mass: Harvard University Press, 1995).

[330] Yoo, "Laws as Treaties?"; Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law," 1212. Bradley and Goldsmith were able to locate 19 such agreements dating back to 1980, mostly dealing with trade and commerce. Oona Hathaway (2008) argued that such agreements were used in every conceivable issue area. Her claim is problematic insofar as her claim conflates ex ante and ex post congressional-executive agreements. For major agreements, ex post congressional-executive agreements are used sparingly.

[331] Bruce A. Ackerman and David Golove, *Is NAFTA Constitutional?* (Cambridge, Mass: Harvard University Press, 1995), 891.

such agreements irrespective of whether the United States actually ratifies the agreements. As John Yoo argues, "[i]f, for example, Congress were to adopt unilaterally the changes in tariffs, customs laws, or national treatment required by NAFTA or the WTO, in the absence of an international agreement, it would have ample authority to do so pursuant to Article I, Section 8."[332] In this way, such agreements, while not concluded as treaties, still retain significant congressional buy-in and do not represent, arguably, any subversion of constitutional principles.

In fact, when Congress has used congressional-executive agreements in the area of trade, for example, it has developed mechanisms (fast-track authority) that give it substantial input during the negotiation and formation of agreements in exchange for fast-track approval post hoc. By requiring the executive branch to keep relevant congressional committees informed throughout negotiations (and even to have members of Congress on the negotiation delegation), Congress ensures that the final deal submitted to Congress for approval closely aligns with congressional views.[333] By, then, fast-tracking approval (with strict time limits on a final vote and no floor amendments), Congress buttresses the United States' negotiating credibility by ensuring that the agreement will not languish in Congress or be subsequently amended in ways that substantially alter the carefully negotiated agreement, a perennial problem with treaties. Unlike the vast majority of treaties, moreover, such agreements involve Congress at the "advice" stage, leading some

[332] Yoo, "Laws as Treaties?," 822–23.
[333] See generally, Sharyn O'Halloran, *Politics, Process, and American Trade Policy* (Ann Arbor: University of Michigan Press, 1994), 139–75; Jasmine Farrier, *Congressional Ambivalence: The Political Burdens of Constitutional Authority* (Lexington, Ky: University Press of Kentucky, 2010), 81–114.

commentators like Ackerman and Golove to assert that the ex post congressional-executive agreement, as used with fast-track trade authority, has better realized the virtues of the Treaty Clause than does the specific textual instantiation of the Treaty Clause.[334] The fundamental point here is that when Congress has used ex post congressional-executive agreements instead of treaties, it has used them in areas where it has the plenary constitutional authority to legislate on the matter and it has often used the agreements in ways that enhance, rather than diminish, its political control over the issues concerned.

CONSTITUTIONAL VERSUS LEGAL CLAIMS

Finally, the claims of Congress vis-a-vis the president regarding its prerogatives over international agreements are ultimately political claims. Congress's role in foreign affairs, as argued above, is not merely about checking and balancing. Rather, Congress's shared powers over foreign affairs in general, and treaty-making in particular, is ultimately about bringing positive political goods to the practice of foreign affairs, making it more likely that the United States' foreign policy will be stable and its agreements credible. Congress, as demonstrated above, has often asserted its political prerogatives to ratify important agreements as treaties rather than to allow those agreements to be entered into at a lower level of authorization. Interbranch contestation surrounding the nuclear deal with Iran, however, reveals the ways that an overly legalistic focus on the powers of the branches can miss — and, consequently, undermine — the larger political purposes of the branches shared powers over international agreements.

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[334] Ackerman and Golove, *Is NAFTA Constitutional?*, 904–8.

Legal analysis provides an inadequate framework for evaluating interbranch behavior with regard to foreign affairs.

The Iran Nuclear Deal (known formally as the Joint Comprehensive Plan of Action or "JCPOA") was a political agreement signed by the P5+1 (the UN Security Council's five permanent members plus Germany) and Iran. According to the terms of the deal, Iran agreed to end key components of its nuclear development program. In exchange, the United States agreed to suspend its unilateral sanctions against Iran, and the UN agreed to lift the international sanctions it had imposed. The agreement, to say the least, was controversial. When Congress learned that President Obama was attempting to broker a deal that would lift congressionally-imposed sanctions on Iran, there was widespread, and bipartisan, opposition. Particularly controversial was the administration's decision to conclude the agreement without subsequent approval from Congress, with the President claiming that he had sufficient authority to conclude the agreement without congressional authorization.[335] The administration's position on the issue resulted in Republican members of Congress writing a controversial open letter addressed to the "leaders of the Islamic Republic of Iran," informing them that any agreement entered into without legislative approval could be abandoned by the next president "with the stroke of a pen."[336]

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[335] David E. Sanger, "Obama Sees an Iran Deal That Could Avoid Congress - The New York Times," *The New York Times*, October 19, 2014, https://www.nytimes.com/2014/10/20/us/politics/obama-sees-an-iran-deal-that-could-avoid-congress-.html.

[336] Peter Baker, "G.O.P. Senators' Letter to Iran About Nuclear Deal Angers White House - The New York Times," *The New York Times*, March 9, 2015, https://www.nytimes.com/2015/03/10/world/asia/white-house-faults-gop-senators-letter-to-irans-leaders.html.

The administration argued that the sanctions regime implemented by Congress delegated to the president the power to suspend sanctions against Iran if the president determined that to do so would be in the national interest.[337] The president, moreover, intended to complete the agreement as a "political" agreement, meaning that it would impose no legal obligations on the United States under international law. The administration believed that a legally non-binding agreement would give it sufficient flexibility to reimpose sanctions should Iran fail to comply with its terms.[338] Harold Koh argues that political agreements, like the one brokered with Iran, are particularly important in contexts where regimes fundamentally distrust each other. As Koh argues, "[t]he Iran Nuclear Deal" was "a confidence-building device designed to shift from a pattern of confrontation toward a pattern of cooperation with Iran."[339] The agreement would thus be successful if both nations, step by step, abided by the terms of the agreement, leading to greater compliance over time and, perhaps, paving the way to a legally-binding arrangement. Given the "political" nature of the proposed accord — that it would not legally bind the United States or the next president — the President argued that he had sufficient legal authority to bring the nation into compliance with the terms of the agreement by waiving sanctions pursuant to his waiver authority.

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[337] Dianne E. Rennack, "Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions" (Congressional Research Service, 2016).
[338] Wendy Sherman, "How We Got the Iran Deal and Why We'll Miss It," *Foreign Affairs*, August 13, 2018, https://www.foreignaffairs.com/articles/2018-08-13/how-we-got-iran-deal. The United States' lead negotiator with Iran, Wendy Sherman, noted that "[t]he deal would require constant reviews of Iran's compliance and it had to allow enough flexibility to quickly restore sanctions if Iran didn't keep its promises. It would have been very difficult to build such flexibility into a formal treaty."
[339] Koh, "Triptych's End," 354.

Congress, however, rightly asserted its institutional prerogatives to review any agreement concluded with Iran before the agreement took effect, given the significance of the agreement for American foreign policy. Congress overwhelmingly passed the Iran Nuclear Agreement Review Act of 2015, requiring the President to submit the final negotiated agreement to Congress, and, moreover, prohibiting the President from waiving sanctions pursuant to the agreement during a 60-day review period. According to the terms of the legislation, the agreement could go into effect if Congress voted to approve the deal during that window. Congress, however, reserved the right to disapprove the agreement by passing a joint resolution of disapproval. If Congress did not act, the agreement would go into effect at the end of the 60-day period. Moreover, the legislation included significant oversight mechanisms meant to keep Congress informed of Iranian compliance with the agreement (should it go into effect), requiring the president to certify that Iran was in compliance with the terms of the agreement every 90 days. Congress could fast-track legislation to reimpose sanctions if Iran violated the terms of the agreement. Arguing about the merits of the legislation, Senator Jeff Flake (R-AZ) argued that

> Since this agreement is slated to last well beyond the President's term and even the next President's term, any effective, enduring agreement has to have congressional buy-in. Let me repeat. If this legislation fails, the President will be able to sign a final agreement and have a nice signing ceremony, but an effective, enduring agreement to prevent Iran from obtaining a nuclear weapon will require congressional buy-in.[340]

[340] 161 Cong Rec S 2493. (April 29, 2015).

Congress was able to mobilize veto-proof majorities in both chambers to enact the legislation subjecting any proposed agreement to congressional review, a feat that took considerable negotiating skill by top congressional leaders.[341] Ultimately, President Obama acquiesced to congressional pressure and announced that he would sign the legislation. This was hardly a concession by President Obama, however, given that under the terms of the legislation it would take supermajorities in Congress to *disapprove* any agreement made with Iran, a near impossibility given partisan dynamics in Congress. Congress, in other words, asserted itself such that it did not have to put any skin in the game, so to speak. President Obama essentially convinced Congress that since he already possessed the legal authority to undertake the actions necessary to implement any agreement with Iran (given that the agreement was legally non-binding and that Congress had already delegated the legal authority to waive sanctions based on presidential discretion) that Congress did not need to affirmatively approve the deal.

While Congress was able to muster enough political will to ensure that it could review and possibly disapprove the agreement — and the benefits of Congress's political efforts here, especially in terms of bringing the salient issues of the agreement into public view, should not be understated — it was not able to muster its political prerogatives in ways that realized the positive institutional goods of having Congress involved in the formation of international agreements in the first place. Members of Congress agreed that the Iran Deal ultimately constituted a major change in U.S. foreign relations towards Iran

[341] Manu Raju and Burgess Everett, "How Cardin and Corker Clinched the Iran Deal: An Indicted Senator and Democratic Disagreements Made for a Tough Assignment," *Politico*, April 14, 2015, http://www.politico.com/story/2015/04/ben-cardin-bob-corker-iran-deal-116979.

— hence Congress's determination to review the terms of the agreement — but Congress's rhetoric about the importance of congressional "buy-in" to ensure an "effective and enduring" agreement was not matched in the terms of the actual bill as passed. Congress purported to assert its political prerogatives, but did so by inverting the normal constitutional procedure for ratifying treaties. The Iran Nuclear Agreement Review Act required supermajorities in both houses to *disapprove* the agreement, rather than the Senate supermajority required to *approve* treaties. In other words, once the deal was negotiated, the president needed only to convince just over a third of one house to support the deal for it to go into effect. Doing so undermined the ability of Congress to deliberate effectively about the actual merits of the deal. At the end of the day, members of Congress could enjoy the political benefits of voting against the agreement while knowing that a "no" vote would have no effect on the final outcome. Congressional deliberations were inconsequential insofar as members of Congress ultimately did not have to bear the political burdens of the ultimate outcome and thus did not have to actually consider the merits of the proposed deal versus no deal at all. It is hard to know, in other words, how members of Congress would have voted had their choices mattered. The deal thus went into effect even though majorities in both houses of Congress opposed the bill.[342] While the deal was legal — and, as David Golove argues, there is no doubt about its legality after Congress passed the review act — it was left politically vulnerable

[342] Jennifer Steinhauer, "Democrats Hand Victory to Obama on Iran Nuclear Deal - The New York Times," *The New York Times*, September 10, 2015, https://www.nytimes.com/2015/09/11/us/politics/iran-nuclear-deal-senate.html. Senate Democrats filibustered a resolution of disapproval in the Senate. The House of Representatives did not pass a resolution of disapproval although it would have easily passed the House.

because it was a major foreign policy commitment made not only without the imprimatur of Congress, but against its expressed will.[343]

This is not to say that the Iran Deal should have been concluded as a treaty. There are perhaps good arguments — along the lines of Harold Koh's arguments above — for "political" agreements that help move states towards better relations with each other through more flexible arrangements. It is to say, however, that the Treaty Clause points to criteria that should guide how Congress asserts its political prerogatives against the President's claims, legal or otherwise. Whether the president has legal authority to take a certain action is beside the point. A Congress that is motivated by the overarching purposes of the Treaty Clause would demand to deliberate and vote on an agreement in a way that matters given the importance of such an agreement for American foreign policy, and, moreover, would wield its other political capacities, up and to impeachment, should the president persist in acting against the deliberative and majoritarian will of Congress. As argued in the previous section, one of the overarching goals of the Treaty Clause was to safeguard the stability of American foreign policy by ensuring that international commitments entered into by the United States had sufficient public support, thus buttressing the United States' credibility in the international arena. A constitutionally-motivated Congress, irrespective of the president's legal claims, would advance and defend its prerogatives, asserting the need to ensure the credibility of the nation in foreign affairs by ensuring that any major agreement — especially one that dramatically changed

[343] David Golove, "Congress Just Gave the President Power to Adopt a Binding Legal Agreement with Iran," *Just Security*, May 14, 2015, https://www.justsecurity.org/23018/congress-gave-president-power-adopt-binding-legal-agreement-iran/.

U.S. foreign policy with regard to Iran — retained sufficient public support to be a durable commitment. Moreover, Congress's substantive deliberations about a controversial and consequential foreign policy choice, could help move public support towards the agreement. Faced with an actual choice — and the responsibility for the ultimate outcome — congressional deliberations could underscore the wisdom (or futility) of the agreement.

Of course, some, like Harold Koh and Jack Goldsmith, argue that such agreements, like the Iran Deal, entered into by the executive branch without robust congressional support are, in fact, durable because they are difficult for future presidents to unwind.[344] As Koh argued prior to the Trump administration's decision to "exit" the Iran Agreement, "[i]f the Iranians continue to keep their part of the bargain, legal or political, the new Administration will be hard-pressed to replace a working multilateral deal with nothing."[345] Indeed, according to Koh, "deals are sticky, regimes are path-dependent, and in complex political equations, the locus of domestic legal authority often plays a subsidiary role."[346] As the deal gained traction, moreover, all involved (national and business interests) started to rely on the new legal framework, as they began to invest their resources in Iran's increasingly globally-connected economy.[347]

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[344] Koh, "Triptych's End," 355–66; Jack Goldsmith, "The Contributions of the Obama Administration to the Practice and Theory of International Law," *Harvard International Law Journal* 57, no. 2 (Spring 2016): 471.
[345] Koh, "Triptych's End," 362.
[346] Koh, 364.
[347] Dominic Gates, "Boeing's $9.5 Billion Iran Deals, Always Uncertain, Are Now Effectively Dead," *The Seattle Times*, May 8, 2018, https://www.seattletimes.com/business/boeing-aerospace/boeings-8-billion-iran-deal-always-uncertain-is-now-effectively-dead/.

Koh and Goldsmith might be correct that most presidents would not exit the agreement absent Iranian non-compliance with its terms. Even so, this does not mean that the agreement was not left politically vulnerable should a president decide, even against what many perceive to be in the best interest of the nation, to exit the agreement, as President Trump ultimately decided.[348] It would have been far more difficult for President Trump to have exited the agreement had the agreement had the deliberative and affirmative consent of Congress at the outset. No doubt the United States' credibility on the international stage — and especially with Iran — has been seriously compromised, and, moreover, it is highly unlikely that the United States will be able to broker a better deal with Iran in the near future given that it cannot be trusted to keep the commitments that it makes.[349] As Wendy Sherman, the chief negotiator for the United States during the Iran Deal negotiations, wrote, the United States' exit from the deal "has given U.S. allies less reason to trust Washington on future deals or to take U.S. interests into account."[350]

It is perhaps no surprise that President Obama stretched the limits of his constitutional authority (given the absence of robust political support in Congress) to conclude an important multilateral agreement with Iran that the administration believed would be the best option for preventing Iran from developing nuclear weapons, taking a major risk in the hope that the next president would have every incentive to stick with the

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[348] Mark Landler, "Trump Abandons Iran Nuclear Deal He Long Scorned - The New York Times," *The New York Times*, May 8, 2018, https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html.

[349] Kay Armin Serjoie, "'The Americans Cannot Be Trusted.' How Iran Is Reacting to Trump's Decision to Quit Nuclear Deal," *Time*, accessed February 24, 2019, http://time.com/5270821/iran-nuclear-deal-trump-ayatollah-khameini-hassan-rouhani/.

[350] Sherman, "How We Got the Iran Deal and Why We'll Miss It."

agreement to the extent that Iran continued to comply with its terms. It is also possible, perhaps even likely, that over time such a deal, if Iran complied, would gain the support of Congress and the American people. The problem, however, is that this was a high-stakes gamble. Given that the agreement was made in opposition to the expressed will of Congress — even though Congress buttressed its legality by passing the review act — it did not have the support necessary to survive if a president was determined to exit. And, moreover, both the fact that public sentiment was clearly against the agreement when it entered into effect and that nearly every Republican presidential candidate vowed in the primaries to exit the deal points to the fact that the agreement was built firmly on sand.[351]

In short, Congress's failure to be motivated by its own constitutional purposes — those purposes deduced from the animating principles of the Treaty Clause's institutional allocation of power — meant that the agreement was ultimately entered into without sufficient congressional buy-in or public support, leaving the agreement vulnerable to the political considerations of an unwise president. The interbranch negotiation surrounding the Iran Agreement is instructive because it demonstrates how the law — whether the president has the legal authority to do something or not — does not provide sufficient criteria for evaluating how the branches engage each other in politics to achieve the aims of the constitutional order in foreign affairs. Without Congressional buy-in, the Iran deal lacked the broad-based support needed for a durable commitment. And when President Trump withdrew from the deal, it undermined American credibility with important allies.

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[351] Nick Gass and Adam B. Lerner, "GOP Candidates Vow to Roll Back Iran Deal," POLITICO, accessed February 24, 2019, https://www.politico.com/story/2015/07/gop-candidates-vow-to-roll-back-iran-deal-120081.html.

While the Iran Agreement might appear, at first glance, as an instance of presidential overreach, the real constitutional failure was Congress's inability (or unwillingness) to exercise its political capacities in a way that matched its rhetoric. Indeed, Congress expressed the importance of exercising its prerogatives over the agreement given the major change the deal represented for American foreign policy towards Iran. But, ultimately, it exercised its prerogatives in a way that was of no consequence (and, in fact, only further buttressed the president's legal position). The ultimate interbranch resolution, as far as the durability of the agreement was concerned, left the United States in the same position it would have been in had Congress decided to abandon the field entirely. The point of this illustration is not to overstate the case about congressional abdication over international agreements. As demonstrated in the previous section, Congress has at times exercised its prerogatives over treaty-making even when to do so meant the failure of agreements that had majority support in both houses of Congress but could not reach the supermajority requirement of the Senate. In this case, President Obama was able to convince Congress — or at least enough members of his own party — that his legal position trumped Congress's political claims. This case, therefore, illustrates both the promise of the political approach to separation of powers insofar as Congress demanded to play a role in the agreement's conclusion, and the residue of a legalistic notion of separation of powers to the extent that the political contestation was motivated more by narrowly legal reasoning than deep constitutional principles.

CONCLUSION: INSTANCES OF CONSTITUTIONAL HEALTH AND CONGRESSIONAL ABDICATION

While the Treaty is the only mechanism prescribed by the Constitution for entering into executive agreements, this chapter has demonstrated that the Constitution's political architecture provides a framework that both accounts for the rise of executive agreements and limits their use. Indeed, the overarching purposes of the Treaty Clause can be gleaned from the reasons underlying the specific institutional commitments of the Clause. Those overarching purposes, moreover, provide constitutional criteria by which the branches can negotiate their boundaries with regard to such agreements in particular moments of conflict. Such agreements, therefore, do not, in principle, point to an imperial presidency overstepping constitutional boundaries. Indeed, while some political scientists have viewed the rise of executive agreements as a unilateral tool of the presidency and as indicative of an imperial presidency,[352] the rise of executive agreements, as argued in this chapter, is to be expected given the president's structural advantages in the foreign arena. These structural advantages were intended, moreover, to ensure the effectiveness of the nation in foreign affairs. In this way, then, the rise of executive agreements are the natural outworking of the Constitution's political program. In other words, the best justification for such agreements is deduced from how such agreements are used to achieve the aims of the constitutional order, and how governmental objectives would be thwarted if the Constitution was to be so strictly interpreted as to prohibit their use entirely. That the aims of the constitutional order would be impossible to attain without executive agreements is

[352] Rudalevige, *The New Imperial Presidency*; Crenson and Ginsberg, *Presidential Power*.

a widely accepted claim. As Edward Corwin wrote in his book *The President's Control Over Foreign Relations*, "as between the organs of government sharing these powers, that organ which possesses unity and is capable of acting with greatest unity, expedition, secrecy, and fullest knowledge — in short, with greatest efficiency — has obtained the major participation."[353]

Understanding the Constitution's political architecture — and the ways in which power over treaty-making is distributed between differently constituted institutions — demonstrates that insofar as there are separation of powers failings these failures are not the result of executive dominance. Rather, the major problems with regard to international agreements are failures by Congress to effectively mobilize its political capacities in response to the need for executive agreements by ensuring that Congress and the public are adequately informed of presidential action in the foreign sphere — a necessary prerequisite for using its other political capacities to rein in a wayward executive branch. Moreover, while Congress has often asserted its political prerogatives over international agreements, demanding that important agreements be concluded with a higher form of congressional authorization, recent practice during the Obama administration suggests that Congress has at times failed to assert its political prerogatives effectively over and against the president's *legal* claims to authority. Its failure to assert its political prerogatives against the president's legal claims led to a major foreign policy failure with regard to Iran.

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[353] Edward S. Corwin, *The President's Control of Foreign Relations* (Princeton: Princeton University Press, 1917), 205.

In short, understanding the purposes underlying the Treaty Clause — those purposes deduced from though distinct from the literal textual instantiation of those commitments — provides a way to understand both the rise and scope of executive agreements. Understanding this framework helps to clarify, moreover, that the problem of executive agreements is not so much one of executive overreach (though there are certainly instances of such overreach) as much as it is a failure of Congress to advance its own constitutional prerogatives in ways that restrain such overreach.

Perverse Politics: Recess Appointments, Noel Canning, and the Limits of Law[354]

On the surface, there is nothing particularly interesting or even controversial about the U.S. Constitution's Recess Appointments Clause, which states that "[t]he President shall have Power to fill all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." In fact, the Clause was approved by the Constitutional Convention with little discussion and without any debate, signaling that the framers understood the Clause merely as a necessary exception to the normal appointments procedures, which requires the advice and consent of the Senate for presidential appointments.[355]

"Uncontroversial," however, is not a term that describes the use of recess appointments in recent practice. On the contrary, recess appointments were one of the central points of contention between the Congress and the Obama administration, culminating in a showdown at the Supreme Court. At issue were several intra-session recess appointments made to the National Labor Relations Board and to the Consumer Financial Protection Bureau (CFPB) in January 2012 even as Congress maintained pro forma sessions — in which a single senator came in to gavel the Senate into session once every three days, but in which no business took place — precisely to prevent President Obama from making recess appointments. The Court intervened in *NLRB v. Noel*

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[354] A condensed version of this chapter was published in *Presidential Studies Quarterly*: Thomas Bell, "Perverse Politics: Recess Appointments, *Noel Canning*, and the Limits of Law." *Presidential Studies Quarterly* 48, no. 2 (June 2018), 373-386.

[355] Michael A. Carrier, "When Is the Senate in Recess for Purposes of the Recess Appointments Clause?," *Michigan Law Review* 92, no. 7 (June 1994): 2224.

Canning, declaring that the Senate, not the President, determines when it is in session, so long as it, at least technically, retains the capacity to conduct business.

Much of the current literature on recess appointments among legal scholars is an attempt to determine the specific meaning of the Recess Appointments Clause and, consequently, to legally settle in some way the boundary between the branches when it comes to the appointments process.[356] This, moreover, is hardly surprising given that the legal meaning of the clause was the central question before the Supreme Court when it decided the case in *Noel Canning*. Political scientists, on the other hand, have largely been concerned with checks and balances and how recess appointments fit within the President's unilateral toolkit, and, therefore, how the ruling in *Noel Canning* affects those interbranch dynamics.[357] The Court's ruling is thus seen as an example of "powering down the presidency" by legally enforcing interbranch boundaries and buttressing Senate prerogatives vis-à-vis the President.[358]

The purpose of this chapter is to reframe the recent interbranch dispute surrounding recess appointments by considering how the modern use of recess appointments can be better understood and evaluated as part of the dynamic political

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[356] Michael B. Rappoport, ""The Original Meaning of the Recess Appointments Clause," *UCLA Law Review* 52 (2005).

[357] Ryan C. Black et al., "Adding Recess Appointments to the President's 'Tool Chest' of Unilateral Powers," *Political Research Quarterly* 60, no. 4 (December 2007): 645–54; Ryan C. Black et al., "Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments," *Presidential Studies Quarterly* 41, no. 3 (September 2011): 570–89; Pamela C. Corley, "Avoiding Advice and Consent: Recess Appointments and Presidential Power," *Presidential Studies Quarterly* 36, no. 4 (December 2006): 670–80; Ian Ostrander, "Powering Down the Presidency: The Rise and Fall of Recess Appointments," *Presidential Studies Quarterly* 45, no. 3 (September 2015): 558–72.

[358] Ian Ostrander, "Powering Down the Presidency: The Rise and Fall of Recess Appointments."

order established by the Constitution. The Constitution, in this understanding, is more than a legal framework intended to settle disputes between the branches or to maintain legal balance through judicial oversight. Rather, the legal provisions of the Constitution rest on a set of normative commitments and substantive goals.[359] From this larger constitutional perspective, the substantive goal of the Recess Appointments Clause is that the government should continue running, absent democratic choice to the contrary. While the literal function of the Clause was to ensure the proper functioning of government when the technological difficulties of travel and communication made long congressional recesses necessary, this literal function is better understood in terms of this higher order constitutional principle. From this perspective, then, there might be other occasions wherein recess appointments are justifiable, even beyond the original intentions and expectations of the constitutional framers: in this case, the breakdown of governmental processes due to the sheer problem of unfettered partisanship.

Evaluating recess appointments from this larger constitutional perspective reveals judicial resolution of the issue actually subverted the Constitution's political processes, preventing the President from staffing the national government even as he faced unprecedented partisan obstruction from a minority faction in the Senate. The Court's policing of constitutional boundaries based on a literal reading of the purposes of the Recess Appointments Clause thus made it appear that the President had acted lawlessly

[359] Sotirios A. Barber, *On What the Constitution Means* (Baltimore: Johns Hopkins University Press, 1984); Jeffrey Tulis, *The Rhetorical Presidency* (Princeton, N.J: Princeton University Press, 1987), 41–45; Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton [New Jersey]: Princeton University Press, 2013).

even as he pressed legitimate constitutional claims to keep the government functioning absent the deliberative will of Congress to the contrary. Conversely, the legal resolution of the issue sanctioned constitutionally-suspect congressional behavior, making unprecedented partisan obstruction of the institution appear high-minded compared to the President's purported "lawlessness." The recess appointments, therefore, were a response to the breakdown of interbranch politics, a problem that judicial resolution disguised rather than resolved.

Political contestation between the branches, unencumbered by the legal arguments about the literal purposes of the Recess Appointments Clause, would have provided opportunities for institutional actors in each of the branches to make arguments about their respective behavior that could then be judged and evaluated by the other branches and the public at large. The Court's intervention in *Noel Canning*, however, precluded this interbranch deliberation. In other words, the Recess Appointments Clause became a site for interbranch contestation but the conflict itself was based on larger political dynamics between the branches that were then obscured by the focus on the literal meaning of the Clause. The recess appointments controversy and its subsequent resolution by the Court, therefore, illuminates the problems with an overly legalized conception of the Constitution's separation of powers.

STANDARD LEGAL ACCOUNT OF RECESS APPOINTMENTS

Article II, Section 2, Clause 2 of the U.S. Constitution provides the President with the power to appoint with the "advice and consent" of the Senate "ambassadors, other

public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The Recess Appointments Clause — which states in Article II, Section 2, Clause 3 that "The president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session" — is an ancillary clause, meant to ensure the functioning of government in the Senate's absence. Indeed, Alexander Hamilton wrote in *Federalist* 67 that

> [t]he relation in which [the Recess Appointments Clause] stands to the [Appointments Clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.[360]

For most of American history recess appointments were hardly controversial. In fact, recess appointments served a valuable function in an age where limited communication and long-distance travel meant that Congress met continuously for several months before recessing so that members could travel back to their states and districts. The practical necessities of the Recess Appointments Clause in a time where significant portions of the year were marked by congressional absence help explain why the Constitutional Convention did not view the Clause as controversial, and saw no need

[360]Alexander Hamilton et al., *The Federalist Papers*, ed. Clinton Rossiter, 1 edition (New York, NY: Signet, 2003), 408.

to even debate its meaning.[361] The purpose of the clause was simple: the President needs the power to ensure the functioning of the federal government in the face of congressional absence. This power, moreover, was necessarily circumscribed by the temporary nature of such appointments, recess appointed officials merely serving until the end of the next Senate session. Recess appointments, in this way, cannot serve as a method by which the Senate is continually circumvented given that such appointments are merely temporary.

Moreover, recess appointments, as a supplement to the general appointment procedures, were considered better than the alternatives: an extended vacancy until the next session, recalling the Senate out of recess to consider a nomination, or keeping the Congress in perpetual session, which would conflict with the prevailing understanding of republican government — and would be expensive and logistically challenging.[362] In fact, Justice Joseph Story, commenting on the clear logic of the Recess Appointments Clause in his *Commentaries on the Constitution of the United States*, wrote that the decision to allow for recess appointments was "so obvious that it can require no elucidation," because without recess appointments "the Senate should be perpetually in session, in order to provide for the appointment of officers."[363] The absence of such a clause, Justice Story asserted, "would have been at once burdensome to the Senate and

[361] Michael A. Carrier, "When Is the Senate in Recess for Purposes of the Recess Appointments Clause?," 2224.
[362] Michael B. Rappoport, ""The Original Meaning of the Recess Appointments Clause," 1498.
[363] Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray and Company; Brown, Shattuck and Company, 1833), 573–74.

expensive to the public," and so the insertion of such a clause represented the need for "convenience, promptitude of action, and general security."[364]

Given the fundamental purpose of the Recess Appointments Clause, it was interpreted narrowly at the outset of American government. President Washington had the first opportunity to construe the Recess Appointments Clause however broadly would fit his purposes. When presented with the opportunity to make a recess appointment for an office that had become vacant while the Senate had been in session, Washington deferred judgment to Attorney General Edmund Randolph who wrote to President Washington that:

> The Spirit of the Constitution favors the participation of the Senate in all appointments. But as it may be necessary oftentimes to fill up vacancies, when it may be inconvenient to summon the senate a temporary commission may be granted by the President. This power then is to be considered as an exception to the general participation of the Senate. It ought too to be interpreted strictly.[365]

Alexander Hamilton, perhaps one of the strongest defenders of executive power among the framers, also concluded that recess appointments were limited to vacancies that arise during a recess, not any vacancy that happens to exist: "It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate."[366]

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[364] Joseph Story, 574.

[365] Randolph, Edmund. 1792. "Opinion on Recess Appointments." July 7, 1792. Retrieved at: http://founders.archives.gov/documents/Jefferson/01-24-02-0176.

[366] See Letter from James McHenry to Alexander Hamilton (April 26, 1799), Harold C. Syrett, *Papers of Alexander Hamilton Vols 1 to 26 Set* (Columbia University Press, 1979), 69–71; Michael B. Rappoport, ""The Original Meaning of the Recess Appointments Clause," 1520.

Even so, the prevailing historical understanding of how widely the Clause should be interpreted recognized that to construe it too strictly could undermine the purpose for which it was adopted in the first place. Attorney General William Wirt asserted in an 1823 opinion that while the text clearly demonstrates that recess appointments can only be made when a vacancy arises *during* a recess, such a construction could hinder the president's ability to make an appointment to a federal office far from the nation's capital should he not receive word that such a vacancy exists in time for him to make an appointment before the ensuing recess:

> The substantial purpose of the Constitution was to keep these offices filled and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the Constitution will be sacrificed to a dubious construction of its letter.[367]

Even so, Wirt maintained that such a construction would not give license to the president to circumvent Senate confirmation. While he asserted that the Clause should be construed broadly enough to ensure "the substantial meaning of the instrument" and to avoid the "most embarrassing inconveniences," such a construction "cannot possibly produce mischief, without imputing to the president a degree of turpitude entirely inconsistent with the character which his office implies."[368] In short, what is clear from early practice is that recess appointments were understood as a serving a practical and necessary purpose in the constitutional order. Insofar as the Clause was construed beyond

[367] 1 Opinion of the Attorney General 631 (1833). 632. (Hereinafter, Wirt Opinion).
[368] Wirt Opinion, 634.

its specific textual instantiation it was done so not to undermine the letter of the law but in service to the broader commitment of the Clause.

In the 20th Century, however, recess appointments became increasingly controversial as presidents used them more frequently, even as Congress stayed in session far more regularly. Moreover, recess appointments, including within shorter intrasession recesses, became a mechanism by which presidents attempted to staff the executive branch in the face of Senate obstruction.[369] The chart below shows the number of recess appointments made by each president starting with Ronald Reagan up until the Court's ruling in *Noel Canning* in 2014.

	Recess Appointments	*Yearly Average*	*Presidential Total*
Ronald Reagan I	134	33.5	
Ronald Reagan II	98	24.5	232
George H. W. Bush	78	19.5	78
William Clinton I	35	8.75	
William Clinton II	104	26	139
George W. Bush I	106	26.5	
George W. Bush II	65	16.25	171
Barack Obama I	32	8	
Barack Obama I	0	0	32

Table 4: Number of Recess Appointments per President [370]

[369] Ryan C. Black et al., "Adding Recess Appointments to the President's 'Tool Chest' of Unilateral Powers"; Pamela C. Corley, "Avoiding Advice and Consent: Recess Appointments and Presidential Power"; Ian Ostrander, "Powering Down the Presidency: The Rise and Fall of Recess Appointments."
[370] Henry B. Hogue et al., "The Noel Canning Decision and Recess Appointments Made from 1981-2013" (Washington, D.C: Congressional Research Service, n.d.).

Given the proliferation of recess appointments at the expense of Congress's constitutional power to advise and consent to executive nominations, it is perhaps not surprising that this use of recess appointments ultimately resulted in a showdown before the Supreme Court in 2013 in *National Labor Relations Board v. Noel Canning*. The recent controversy surrounding *Noel Canning* was caused by the Senate's use of pro forma sessions to prevent recess appointments. Because recess appointments have increasingly been used by presidents to appoint controversial nominees, pro forma sessions of the Senate were supposed to serve as a buffer to keep the President from making such nominations by keeping the Senate in perpetual session by having one Senator gavel the chamber into session once every three days so that the Senate would not be in recess for longer than three days. This strategy was considered in the 1980s and 1990s, but never used.[371]

When the Senate finally implemented pro forma sessions in 2007 to prevent President George W. Bush from making recess appointments, the President abided by the will of the Senate. President Bush was thus prevented from making recess appointments for the last 14 months of his presidency because Congress, at least technically, did not recess.[372] Such pro forma sessions, according to some estimates, prevented President

[371] Henry B. Hogue, "Recess Appointments: Frequently Asked Questions" (Washington, D.C: Congressional Research Service, 2013), 11.
[372] Henry B. Hogue, "Recess Appointments Made by Barack Obama" (Washington, D.C: Congressional Research Service, 2017), 12.

Bush from making dozens of appointments, diminishing presidential influence in a variety of policy areas.[373]

After Republicans regained the House in the 2010 midterm elections, the Senate once again began holding pro forma sessions to prevent President Obama from making recess appointments even though Democrats held a majority in the Senate. The Senate maintained pro forma sessions because the Republican-controlled House of Representatives would not agree to adjourn. The Adjournments Clause in the Constitution (Article I, Sec. 5, Cl. 4) requires that both chambers agree to any adjournment longer than three days. Hence, the Republican-controlled House was able to force the Senate to maintain pro forma sessions to prevent recess appointments, while, at the same time, the Republican minority in the Senate obstructed appointments through the use of the filibuster.

Because of this minority obstruction in the Senate, President Obama made three recess appointments to the National Labor Relations Board, and also recess appointed Richard Cordray to the Consumer Financial Protection Bureau during a short three-day break between pro forma sessions. The recess appointments to the NLRB came after months of Senate delay and as NLRB vacancies kept it from reaching a quorum, thus preventing it from functioning. Appointments to the NLRB had become increasingly partisan over the years, and so recess appointments became a prime way in which the

[373] Ian Ostrander, "Powering Down the Presidency: The Rise and Fall of Recess Appointments," 563; Ryan C. Black et al., "Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments."

President ensured that the NLRB could maintain a quorum so that labor groups and organizations could air grievances against employers and so that business interests could face the threat of sanctions for unfair business practices.[374] Richard Cordray's appointment to the CFPB was similarly thwarted by a partisan filibuster by Senate Republicans, the minority party in the Senate, and this after the Republicans had blocked Elizabeth Warren's nomination to the post.

Given these circumstances, President Obama, under advice from the Office of Legal Counsel, declared "the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for the purposes of the Recess Appointments Clause."[375] By not counting the pro forma sessions as legitimate interruptions to the Senate's recess, President Obama determined that the Senate had recessed from December 20, 2011 and would not reconvene until January 23, 2012, a recess of longer than a month. These appointments set off a partisan fire-storm, with nearly 40 Republican Senators condemning the appointments and voicing their intention to file a "friend of the Court" brief, expressing their support for legal action in a letter to the President.[376] Senator John Cornyn (R-Texas) went so far as to say that "American democracy was born out of a rejection of the monarchies of Western Europe, anchored by limited government and separation of powers," and that "[w]e refuse to stand by as this

[374] Joan Flynn, "A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935-2000," *Ohio State Law Journal* 61 (2000): 1361–1455; Ian Ostrander, "Powering Down the Presidency: The Rise and Fall of Recess Appointments."
[375] Henry B. Hogue, "Recess Appointments Made by Barack Obama," 14.
[376] Seung Min Kim, "Republicans Join Challenge of Recess Appointments," *POLITICO*, February 3, 2012, https://www.politico.com/news/stories/0212/72422.html.

President arrogantly casts aside our Constitution and defies the will of the American people under the election-year guise of defending them."[377]

In its determination of the scope of the Recess Appointments Clause in *NLRB v. Noel Canning* (2014),[378] the Court largely considered the original meaning of the text, and looked to historical practice to fill in textual gaps. Hence, most of the debates focused on whether the President can make appointments for any vacancy in any recess or only those in which the particular vacancy arose. Moreover, the Court considered the definition of recess, and whether the Clause applied to both inter-session and intrasession recesses. The court ruled unanimously that President Obama's recess appointments exceeded constitutional limits, though it split 5-4 on how widely the Clause should be construed. While a minority on the Court would restrict the use of recess appointments solely to intersession recesses and only for vacancies that arose in the particular recess, the majority construed the Clause far more broadly.

Writing for the Court, Justice Breyer argued that an examination of founding era dictionaries, common usage of the term "recess" during the founding era, and historical practice could not definitively answer the question of what types of recesses are appropriate.[379] Because presidents had made recess appointments for both types of recesses and because the distinction between the two types of recesses is largely inconsequential today, the Court held that either type of recess is appropriate for recess

[377] Ibid.
[378] 573 U.S. ___ (2014).
[379] NLRB v. *Noel Canning* (2014), 9-21.

appointments. Drawing upon historical precedent, however, the Court drew a bright line rule, declaring that recesses of less than ten days — regardless of what type of recess — would be constitutionally inappropriate. The Court made this determination by looking to the Adjournments Clause,[380] concluding that a recess of shorter than three days was constitutionally inappropriate. According to the Court's reasoning, a recess that is not long enough to require the consent of the other chamber is presumptively too short for recess appointments. The Court also held that historical practice revealed that presidents had never, minus a few exceptions, made recess appointments during recesses lasting less than 10 days.

Moreover, the majority declared that reading the Clause to only reach vacancies that arise during a recess could prevent the President from making necessary appointments. Given that the very purpose of the Recess Appointments Clause is to ensure that the President can "obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them,"[381] construing the Clause too narrowly "would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the last session the office fell vacant."[382]

[380] Art. I, Sec. 5, Cl. 4.
[381] Ibid., 23.
[382] Ibid. 26.

The crucial part of the ruling, however, concerned the legitimacy of pro forma sessions. Indeed, Justice Breyer asserted that "the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."[383] The Court, thus, placed great emphasis on the ability of each House to "determine the Rules of its Proceedings."[384] Perhaps ironically, the majority's broad interpretation of what would constitute an acceptable recess appointment, despite Justice Scalia's trenchant critique of the majority's decision as granting the President too much power vis-à-vis Congress, made it *easier* for the Senate to block recess appointments than the minority's strict construal of the clause in Justice Scalia's concurrence. The decision, therefore, was widely characterized as a "rebuke" of the President by the Supreme Court.[385]

The implications for the President have already been clearly exhibited in practice. President Obama was prevented from making any recess appointments during his second term in office.[386] After Senate Republicans refused to even conduct hearings for President Obama's Supreme Court nominee Merrick Garland, there was some speculation that the President could recess appoint him to the Court.[387] Senate Majority Leader Mitch

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[383] Ibid., 34.
[384] Art. I, Sec. 5, Cl. 2.
[385] Adam Liptak, "Supreme Court Rebukes Obama on Right of Appointment," *The New York Times*, June 26, 2014, sec. Politics, https://www.nytimes.com/2014/06/27/us/supreme-court-president-recess-appointments.html.
[386] Henry B. Hogue, "Recess Appointments Made by Barack Obama."
[387] Amber Phillips, "How Obama Could Appoint Merrick Garland to the Supreme Court, and Why It'll Never Happen," *Washington Post*, March 21, 2016, sec. The Fix, https://www.washingtonpost.com/news/the-fix/wp/2016/03/21/how-obama-could-appoint-merrick-garland-to-the-supreme-court-and-why-itll-never-happen/.

McConnell, however, moved to keep the Senate in pro forma sessions, thus preventing any such recess appointment. Hence, as Ian Ostrander aptly noted, the Court's ruling in *Noel Canning*, even in its broad interpretation of the Clause, is an example of "powering down the presidency," especially during periods of divided government.[388]

THE APPOINTMENTS PROCESS AND THE CONSTITUTION'S POLITICAL ARCHITECTURE

The Court's decision in *Noel Canning* clearly had the effect of diminishing the President's ability to make recess appointments. The main question of this chapter is whether the legal resolution of the issue missed key elements of the dispute and, therefore, subverted and ended a political struggle between the branches that would have been better left to the political process. Answering this question requires understanding the Constitution in light of its purposes and ends. If the Constitution is primarily understood as a legal document — in which the branches' powers are understood primarily in terms of the literal meaning of the constitutional text — then it makes sense that the Court would enforce constitutional boundaries as it did in *Noel Canning*. The Court's determination of the limits of the Clause and its legal buttressing of Senate prerogatives — "The Senate is in session when it says it is" — is thus a logical outgrowth of the type of project established by the Constitution. Constitutional fidelity, in this view, is best understood in terms of adherence to the legal text as interpreted and enforced by the judiciary. The Constitution, therefore, serves a settlement function in the

[388] Ian Ostrander, "Powering Down the Presidency: The Rise and Fall of Recess Appointments."

constitutional order, and separation of powers is primarily understood in terms of constraint.

An alternative way to understand the recess appointments phenomenon, however, is to view it as situated within the dynamic political order created by the Constitution. From this perspective, the Constitution does more than assign powers to the branches in a strictly legal sense. Rather, the Constitution establishes congeries of structures, powers, and duties. The recess appointments controversy can best be evaluated, therefore, by attention to the larger substantive ends of the appointments process in general and why the framers included both branches in that process. The choice to include the political branches in the process of staffing the executive branch and the judiciary was not an arbitrary choice, as made clear by the constitutional debates over the issue. Rather, both political branches bring specific capacities and perspectives that are important to the process.

Indeed, Hamilton illustrates in *Federalist* 76 how the different *structures* of the two elected branches of the government are both important to the selection and confirmation of nominees. For example, the unitary nature of the executive better enables the choice of a nominee because it avoids the "display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly."[389] Hamilton continued: "I proceed to lay it down as a rule that one man of discernment is better fitted to analyze and estimate the peculiar

[389] Hamilton et al., *The Federalist Papers*, 454.

qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment."[390] Indeed, the "sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them."[391] Placing the power to appoint in the hands of the President, therefore, makes it more likely that a choice will be selected in a timely manner, avoiding the delay that would be caused by placing the choice in a deliberative assembly. Furthermore, by placing the power to appoint in the hands of one person, it increases the chances that the person will nominate good candidates for the post because blame for bad choices will reflect solely upon the president. In a legislature, however, blame could be diffused across the body.

Beyond the particular structural qualities that presumably foster better selection, the President is certainly motivated by political concerns as well. At least in theory, the president makes selections with an eye towards a nominee's character, competence, but also a nominee's particular views on the subject matter for which that nominee will exercise responsibility. The administration of the laws is not merely technical, but involves discretion and political judgments. Hence, a nominee's particular policy views are important considerations for the President, who ultimately is tasked with overseeing

[390] Ibid.
[391] Ibid.

the executive branch and administering the laws passed by Congress. The President thus has a vested role in nominating subordinates based on his own political preferences.

The deliberative capacities of the Senate, on the other hand, ensure that an appointment is only concluded after a public process. This deliberation, while extending to the character and competence of a nominee, certainly also pertains to larger questions of politics as well. This is especially true when it comes to staffing the judiciary. The President obviously makes his or her selection of jurists with regard to the particular constitutional views — not just the professionalism or legal competence — of a nominee. These questions, therefore, are certainly fair game for the Senate to consider given the contestability of the criteria involved in the selection process. Indeed, questions concerning what constitutes a qualified jurist or a good interpretation of the Constitution are ultimately political questions. The Constitution does not itself specify how it ought to be interpreted. Neither does it provide criteria as to what kind of person should appropriately serve. The political circumstances surrounding a particular vacancy, moreover, perhaps raise further considerations regarding what would constitute an appropriate choice. Should there by an ideological balance on the Court and, consequently, should the Senate demand that the replacement for a swing vote have similarly moderate ideological leanings? Does the Senate believe that a recent case was wrongly decided (for example, cases dealing with abortion or campaign finance), and that the constitutional questions surrounding the case should be reconsidered — and, moreover, that any potential jurist should answer questions about how they would rule if the constitutional question was to be revisited in a similar case? Senate confirmation

hearings and floor debate, therefore, are essential mechanisms for both advancing congressional preferences on the choice as well as engaging the wide range of issues that would constitute a valid choice, especially given the political contestability of such criteria in the first place.

This is perhaps an important point to dwell on, especially given the ways in which Senate confirmation hearings have largely been marked by the absence of substantive deliberation in recent years, perhaps most strikingly in the Congress's refusal to hold hearings at all for Merrick Garland — or to even meet with him. The Senate Republicans declared that they would not hold confirmation hearings and would not consider the nomination because it was an election year and, consequently, the American people should rightly decide who the next Supreme Court Justice should be by choosing the next president who would then make the nomination.[392] This, of course, presumes that the American people can be trusted to make such an important choice in an election — an election, moreover, in which who the next Supreme Court jurist should be is but one issue among many — absent substantive Senate deliberations on the matter. As Joseph Bessette argues, "we should not be surprised if instantaneous opinion bears little resemblance to what would result from serious reasoning on the merits."[393] Indeed, if a polling company were to conducted a poll at the outset of the nomination, it would likely

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[392] Mike DeBonis and Paul Kane, "Republicans Vow No Hearings and No Votes for Obama's Supreme Court Pick," *The Washington Post*, February 23, 2016, https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/key-senate-republicans-say-no-hearings-for-supreme-court-nominee/.

[393] Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government*, American Politics and Political Economy Series (Chicago: University of Chicago Press, 1994), 213.

find public opinion to be shallow and uninformed as most citizens can hardly be expected to have thought much about it or to know the relevant criteria for making an informed judgment on the matter. And yet, the poll results are generally seen as indicative of the People's preferences. Therefore, the People's voice in an election can hardly be viewed as a referendum on a Supreme Court nomination if there is no deliberation fostered by the political institutions that are meant to channel and refine public opinion through their deliberations. Why have a Congress at all if technological advancements have made it possible to make decisions based on public opinion surveys that presidents can consult?

While the blocking of Merrick Garland's appointment was perhaps one of the most extreme examples of Congressional failure to substantively deliberate on the merits of particular jurists, such confirmation hearings have long been marked by the absence of robust deliberation — especially as potential jurists refuse to answer substantive questions about their relevant constitutional views on a number of publicly salient issues — even as the political issues animating support or disapproval of a nominee are evident to anyone who watches the events unfold. The one exception in the modern era, of course, is the infamous Robert Bork confirmation hearing, which is today generally viewed as the type of political event to be avoided. While the Senate deliberations regarding Bork certainly had their fair share of nastiness — indeed, the verb "to bork," meaning to systematically defame or vilify, was added to the lexicon — the Senate asked substantive questions of Bork and Bork answered the questions with a high degree of candor. As Nina Totenberg commented at the time,

> The Committee's hearings on the nomination of Judge Robert Bork were, in my view, the first time the process worked properly. Leaving aside for the moment the question of outside influences, the Senate, for a change, gave itself enough time, and the senators prepared themselves. They asked probing but, for the most part, respectful and proper questions, and they knew enough to follow up and find out what the nominee really meant in his answers.[394]

Given the substantive nature of the Senate deliberations, the public was greatly informed, moreover, about the specific nature of Bork's views on a number of highly consequential issues, especially as senators pressed him to clarify his views during their questioning:

> The Senator's questioning was effective not because Bork's position was right or wrong, but because the nominee was not permitted simply to make a broad motherhood-and-apple-pie statement embracing free speech. His restricted view of what speech is protected by the Constitution became clear. In other areas - privacy, gender discrimination, race discrimination - Bork was similarly pressed so that his views emerged with some clarity, not in broad generalizations, but tested against what he had said in the past.[395]

As the public became more informed over the course of the confirmation process, public opinion changed dramatically, as shown in a series of *Washington Post*-ABC News Polls.[396] A month after Bork was nominated, but before the hearings, a poll found that only about 45 percent of respondents had heard of Bork, and of these 45 percent supported while 40 percent opposed the nomination.[397] Public support began to change during the hearings, however, as revealed by a poll taken directly before and after the

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[394] Nina Totenberg, "The Confirmation Process and the Public: To Know or Not to Know," *Harvard Law Review* 101, no. 6 (April 1988): 1220.
[395] Nina Totenberg, 1221.
[396] Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (Yale University Press, 2017), 23.
[397] Al Kamen, "Bork Fails to Catch Public's Eye: Opinion Is Split among the Informed," *Washington Post*, August 7, 1987.

hearings in which 70 percent of respondents had heard of Bork, and of those 44 supported his nomination while 48 percent opposed.[398] Ten days after the Senate rejected Bork's nomination, public opinion had decisively moved against Bork. Indeed, 78 percent of respondents had heard of Bork, and of those only 38 percent supported his nomination while 52 percent opposed.[399] What should be clear from this evidence is that the substantive nature of the confirmation hearings greatly impacted public opinion, thus demonstrating the ways in which the Senate's deliberations are essential to constructing public opinion by bringing the publicly salient issues to the fore in robust debate.

While some deference might be accorded to the President for the appointment of executive branch nominees, this does not mean that Congress should fully defer to the President in the staffing of departments and agencies. Indeed, the executive branch is largely tasked with implementing laws passed by Congress, laws over which Congress has a legitimate stake in maintaining oversight. Insofar as the administration of government requires discretion and political and policy judgments, Congress certainly has a role in deliberating on whether a particular nominee is appropriate. Given the move towards administrative governance dominated by the executive branch, the appointments process is a crucial way in which Congress maintains a role in the programs and offices it creates. Moreover, Congress can affect the administration of the laws by changing laws, eliminating or diminishing the power of particular departments or agencies. These,

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[398] Edward Walsh, "Public Opposition to Bork Grows: In Shift, Plurality Objects to Confirmation, Post-ABC Poll Finds," *The Washington Post*, September 25, 1987.
[399] Edward Walsh and Richard Morin, "Majority Opposes Bork, Poll Shows," *Washington Post*, October 16, 1987.

however, are all *affirmative* actions determined by deliberative will of a majority in Congress.

From this perspective, then, the branches do not share power over appointments primarily in terms of a checking function, or merely to maintain a legal balance of power. Rather, the legal assignments of power point to affirmative duties, the exercise of which is meant to ensure the selection of good nominees through interbranch deliberation — and even conflict — about the direction of the government and the administration of the laws, areas in which both branches have a legitimate stake. The branches both bring a variety of concerns to that process, and the political engagement between the branches is thus meant to foster deliberation about the ends of government, structured by the different perspectives and concerns of differently constituted institutions.

LEGAL RESOLUTION AND THE SUBVERSION OF POLITICS

With this account of the purposes of the branches' shared power over appointments in view, it becomes possible to see how the judicial resolution of the recess appointments controversy undermined a dynamic political process between the branches because it missed, or at least obscured, the underlying nature of the dispute in the first place. While President Obama made recess appointments during a three-day weekend between two pro forma sessions of the Senate, these appointments were not made to bypass the majoritarian will of the Senate. On the contrary, President Obama made the recess appointments because the deliberative process itself had broken down due to hyper-partisan obstruction of the Senate by a minority faction. The President's actions,

therefore, were a response to congressional abdication in the appointments process rather than a willful attempt to ignore the affirmative decisions of the Senate majority.

By the time President Obama made the recess appointments at issue in *Noel Canning*, Senate Republicans, as the minority party in the Senate, had held up nearly 200 agency nominations, nearly half (43 percent) of all of President Obama's civilian nominees.[400] For a striking contrast, during the last two years of President George W. Bush's term – when he faced a unified Democratic Congress – 75 percent of his civilian nominees were still confirmed. Moreover, by mid-to-late 2009 during the midst of the financial crisis — and as crucial decisions needed to be made regarding the implementation of the Troubled Asset Relief Program (TARP) — the Senate had failed to confirm key Treasury Department officials, as well as key officials in other economic and banking-related departments and agencies.[401] The result was that the President and his administration were hampered in their ability to implement the very laws that Congress had passed and tasked him to implement, and this during the midst of an economic crisis that called for decisive action.

However, the obstruction of executive nominees extended beyond mere delay. The Republican minority obstructed some nominees through the filibuster because they disagreed with the laws to be implemented, or disliked the departments or agencies that

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[400] Jonathan Weisman, "Experts Say Obama's Recess Appointments Could Signify End to a Senate Role," *The New York Times*, January 7, 2012, sec. Politics, https://www.nytimes.com/2012/01/08/us/politics/experts-say-obamas-recess-appointments-could-signify-end-to-a-senate-role.html.

[401] Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, Revised, Expanded ed. edition (New York: Basic Books, 2016), 97.

needed to be staffed. In fact, in some instances Republicans vowed to block *any* nomination, no matter how distinguished or qualified the individual. One striking example of such obstruction by Senate Republicans — especially as it relates to the recess appointments at issue in *Noel Canning* — was the filibuster of Richard Cordray to head the Consumer Financial Protection Bureau (CFPB). The CFPB was established by Congress in the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, passed by Congress and signed by President Obama in 2010. The Republicans, who opposed key provisions of the law — including the structure of the CFPB —vowed not to confirm a director until aspects of the law were changed. Hence, Republicans, even while praising Cordray's background, qualifications, and character, refused to consider his nomination, and blocked it by filibuster.[402] In other words, while Congress had only recently passed the law, Republicans, from their minority position in the Senate, made the law impossible to implement.

Such tactics extended to other offices as well, including a filibuster of Donald Berwick, whom President Obama later recess appointed, to run the Centers for Medicare and Medicaid Services, because Republicans opposed, and sought to obstruct, the implementation of the health care law.[403] President Obama's invalidated recess appointments to the National Labor Relations Board, moreover, were meant to give the board a quorum — after months of filibusters and delays — so that it could actually adjudicate pending claims. Criticizing Republican obstruction, Senator Chuck E.

[402] Ibid. 100.
[403] Ibid. 99.

Schumer (D-NY) said, "The Republicans goal here is not simply to object to people who have views they think are out of the mainstream, but to shut down parts of the government they don't like."[404] Hence, having lost the debate on the laws they opposed, Senate Republicans, from their minority position in the Senate, attempted to keep those laws from being implemented by obstructing nominations.

The President, therefore, was not prevented from making appointments because the nominees were opposed by the deliberative will of Congress. Rather, the President was prevented from making appointments because of partisan obstruction at an unprecedented level, using delay tactics such as holds and filibusters, tools whose constitutional status are highly questionable themselves.[405] Of course, delay in the service of enhanced deliberation can be a good thing. Indeed, *The Federalist* makes clear that one of the benefits of having a Senate constituted as a smaller body than the House of Representatives, and with significantly longer terms of office, was to add a more stable and deliberative perspective on politics than the House, given the House's close proximity to the people. A legislative chamber so constituted would thus be less likely to give into the passions of the people through quick and short-sighted decision-making.[406]

While the filibuster is often celebrated with regard to the Senate's tradition of unlimited debate, and thus characterized as a tool that enhances the deliberative qualities

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[404] Weisman, "Experts Say Obama's Recess Appointments Could Signify End to a Senate Role."
[405] Josh Chafetz, "The Unconstitutionality of the Filibuster," *Connecticut Law Review* 43, no. 4 (2011): 1005–40; David A. Crockett, "The Contemporary President: Should the Senate Take a Floor Vote on a Presidential Judicial Nominee?," *Presidential Studies Quarterly* 37, no. 2 (2007): 313–30.
[406] See Federalist 62-63.

of the Senate,[407] the problem with the filibuster, as Josh Chafetz has argued, is that in actual practice the "filibuster is not about unlimited debate — indeed, it is not about debate at all. It is simply about permanent minority obstruction."[408] Moreover, the historical record on the filibuster does not provide support for the way the filibuster is used today. Indeed, in early constitutional practice, delay in Senate voting was in the service of majoritarianism, not in opposition to that principle. For example, in 1790 the House of Representatives voted to move Congress to Philadelphia, but the Senate voted down the measure. Samuel Johnston was so sick he had to be brought in his bed to participate in the vote.[409] Taking advantage of bad weather, the House of Representatives took up the issue again. Given that Johnston was not able to be brought to the Senate chamber due to the rain, other Senators who opposed the motion spoke until the Senate adjourned for the day, thus ensuring that the minority could not win by taking advantage of bad circumstances.[410] While filibusters were used frequently throughout the 19th Century — championed especially by John C. Calhoun — such filibusters did not prevent the majority from enacting its agenda. Indeed, given the smaller legislative agenda at the time, the majority could simply wait out the minority. In fact, every bill filibustered before 1880 eventually passed.[411] As the congressional agenda increased, the Senate

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[407] Michael J. Gerhardt, "The Constitutionality of the Filibuster," *Constitutional Commentary* 21, no. 1 (Summer 2004): 445–51.
[408] Josh Chafetz and Michael J. Gerhardt, "Debate, Is the Filibuster Constitutional," *University of Pennsylvania Law Review PENNumbra* 158 (2010): 250.
[409] Josh Chafetz, "The Unconstitutionality of the Filibuster," 1221; Catherine Fisk and Erwin Chemerinsky, "The Filibuster," *Stanford Law Review* 49, no. 2 (January 1997): 187–88.
[410] Josh Chafetz, "The Unconstitutionality of the Filibuster," 1023–24.
[411] Catherine Fisk and Erwin Chemerinsky, "The Filibuster," 195.

introduced cloture rules in 1917 so that filibusters would not derail the entire Senate agenda. During the 20th Century filibusters were most prominently (and infamously) used against civil rights legislation.

Today filibusters are not deliberative at all because they merely force supporters to muster 60 votes to pass a piece of legislation — or to confirm a nominee. Moreover, given the two-track system the Senate has developed, once the intention to filibuster is announced, the issue is moved off the calendar until the majority can muster 60 votes, thus ensuring that such filibusters do not prevent the Senate from moving onto other issues. As Chafetz argues, this "significantly decreases the costs of filibustering — no longer must a filibusterer justify his tying up the entire business of the Senate to his constituents or colleagues, and no longer must the filibusterer summon the physical endurance to hold the Senate floor."[412] In practice, therefore, the increased use of the filibuster now means that almost any controversial legislation or nomination requires a 60 vote supermajority to pass, and that a minority can continually prevent the majority's preferences from being enacted into law without having to make substantive justifications for the obstruction.[413]

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[412] Josh Chafetz, "The Unconstitutionality of the Filibuster," 1010; Catherine Fisk and Erwin Chemerinsky, "The Filibuster," 203. ("The stealth filibuster is easier, both physically and politically….").

[413] Given rule changes in the Senate, however, filibusters now cannot be used for executive appointments, and Senate Republicans also changed the rules to prohibit filibusters for judicial nominations as well. These rule changes now mean that filibusters are no longer used to hold up executive nominations. Even so, the point of this chapter is to show how the Court's legalistic conception of the Recess Appointments Clause and its subsequent invalidation of President Obama's recess appointments was not attentive to the political dynamics involved in that particular instance. The rule changes that would have made such recess appointments no longer necessary, in other words, does not bear on the specific critique made in this chapter.

Article I, Section 5, Clause 2 of the Constitution — as noted by the Court in *Noel Canning* — grants each chamber of Congress the power "to Determine the Rules of its Proceedings." From a purely legal perspective, then, there is nothing unconstitutional about the filibuster. However, the widespread use of filibusters, especially for nominations to staff the government undermines the governmental efficiency for which the Articles of Confederation were abandoned in the first place.[414] Criticizing super-majoritarian rule under the Articles, Alexander Hamilton wrote in *Federalist* 22 that the result of such rules, rather than being beneficial to good government, is to "destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an intransigent, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority."[415] The filibuster, as practiced today, solidifies the power of the minority, basically changing the Constitution such that those provisions that merely require majority votes in Congress now require supermajority votes in the Senate. As Chafetz argues, the problematic nature of the filibuster, in its current form, is perhaps made most clear by analogy. Indeed, the Constitution also gives both chambers the power to "Judge ... the Elections ... of its own members."[416] There would thus seemingly be no constitutional problem with the Senate thus adopting a rule stating that any member of the Senate seeking re-election would be deemed the winner of the election unless the

[414] Sarah A. Binder and Steven S. Smith, *Politics or Principle: Filibustering in the United States Senate*, First edition (Washington, D.C: Brookings Institution Press, 1996), 31–33.
[415] Hamilton et al., *The Federalist Papers*, 143.
[416] Article I, Section 5, Clause 1.

challenger received at least 60 percent of the vote.[417] Indeed, the 17th Amendment only provides that "the Senate . . . shall be composed of two Senators from each State, elected by the people thereof," and that "[t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures," but does not state that the candidate with the most votes wins. But, as Chafetz notes, such a rule could not be constitutional because it would entrench officeholders and make it harder for the people to hold their government accountable: "Any use of the Senate's power under the Rules of Proceedings Clause that frustrates this principle must be unconstitutional."[418] No doubt, such a rule would be widely viewed as constitutionally inappropriate if a chamber of Congress were to adopt it, and this is true regardless of whether such a rule could be found unconstitutional by the judiciary. The way the filibuster works today, in practice, entrenches the preferences of past majorities in the same manner as did the hypothetical presented above for legislators, making it difficult for new majorities to change governmental policy.[419]

Of course, the Senate is not meant to be a rubber stamp for the President's agenda, and, as noted earlier, there might be legitimate ways in which Congress opposes the President and his agenda. For example, the Senate can vote down individual nominees and force the President to submit a new nominee more favorable to the Senate. The Senate can also get rid of departments or agencies, or diminish their influence within

[417] Josh Chafetz, "The Unconstitutionality of the Filibuster," 1010–11.
[418] Josh Chafetz, 1013.
[419] Josh Chafetz, 1013.

the federal government. The problem, however, with the appointments process as it has played out in recent years, though especially during the Obama administration, is the wholesale obstruction of the administration by a minority faction within the Senate rather than affirmative actions on behalf of the Senate majority after a deliberative process. Without affirmative choices made by the Congress, the President, therefore, is left to administer a government without key subordinates. Congressional use of the filibuster to engage in wholesale obstruction of the will of the majority poses major constitutional problems even though there is no legal or judicial solution that could be used to solve the problem. The fact that constitutional norms are underenforced, however, does not mean that there is not a way to evaluate or to think constitutionally about such norms. Indeed, as Paul Brest argues, the fact that the judiciary is deferential in such contexts does not "suggest that the legislature should exercise restraint in assessing the constitutionality of its own product."[420] Indeed, what should be clear from the present discussion is the extent to which the filibuster as practiced today in no way advances constitutional aims, merely grinding the government to a halt without substantive engagement with the issues at stake.

In light of this breakdown of the appointments process due to partisan obstruction in the Senate, the President had a legitimate constitutional claim to make recess appointments in his attempt to fulfill his constitutional task to take care that the laws be faithfully executed. While the framers imagined instances wherein the Senate would be

[420] Paul Brest, "The Conscientious Legislator's Guide to Constitutional Interpretation," *Stanford Law Review* 27, no. 3 (February 1975): 586.

out of session due to the technological difficulties of travel and communication during the 18th and 19th centuries, the larger purpose of the clause — its animating principle — is the continuation of government absent congressional choice to the contrary. In other words, the President's job is to faithfully execute laws passed by Congress, and he requires subordinates to help him in this administrative function. Given this larger purpose, the President had a legitimate claim that his recess appointments were appropriate given that the deliberative process in the Senate had broken down due to the obstructionist tactics of a Senate minority, those tactics made possible by recourse to a Senate procedural rule that is constitutionally suspect. The President, therefore, was using his recess appointments power in order to keep the government functioning based on the choices a majority in Congress had already made, and in light of what the majority in the Senate would likely have approved absent such obstruction. While it is true that this is not a use of recess appointments imagined by the framers, neither did the framers intend a Senate so thoroughly enervated by hyper-partisanship and thus unable to function. The President was simply making temporary appointments to achieve the overarching purpose of the Clause.

Ultimately, only political contestation between the branches could have settled these competing claims. Political contestation wherein the branches could justify their behavior to each other in front of the electorate — rather than legal determinacy — would perhaps structure a more robust deliberative space in which the political branches could have worked out the merits of differing constitutional and policy positions, a process that was abruptly ended by the Court's intervention into the process. Leaving

such a dispute to politics, moreover, would not necessarily give the President a free hand. Rather, the President ultimately has to make legitimate constitutional claims about the need for recess appointments given the relevant circumstances. Congress, of course, has political tools to combat the President's use of recess appointments should those appointments actually undermine the will of the deliberative majority of the Senate. Congress can censure the President, cut off funding for the offices in question, and even impeach a President who continues to defy the will of Congress.

In fact, it is not difficult to imagine different scenarios in which the Congress would strongly oppose and resist recess appointments. For example, there was some speculation that President Trump wanted to fire Attorney General Jeff Sessions so that he could appoint a new attorney general who could then fire Independent Counsel Robert Mueller, who was investigating potential collusion between Russia and the Trump campaign during the 2016 election, as well as potential obstruction of justice by President Trump for firing FBI Director James Comey after Comey allegedly refused to end the investigation. Senators from both parties made clear that they would oppose such a move and that there was no room in the Senate calendar to consider a replacement for Sessions should the President fire him.[421] Senator Lindsey Graham (R-SC) went so far as to say that "[i]f Jeff Sessions is fired there will be holy hell to pay."[422] The Senate then held pro

[421] Amber Phillips, "Analysis | How Trump Could Replace Jeff Sessions in a Recess Appointment," *Washington Post*, July 27, 2017, sec. The Fix Analysis Analysis Interpretation of the news based on evidence, including data, as well as anticipating how events might unfold based on past events, https://www.washingtonpost.com/news/the-fix/wp/2017/07/27/how-trump-could-replace-jeff-sessions-in-a-recess-appointment-and-how-republicans-can-prevent-that/.
[422] Ibid.

forma sessions to prevent President Trump from making such a move. Given the political circumstances surrounding President Trump and the Russia investigation, it is hard to imagine Congress allowing such an appointment to go unanswered. The difference between the two scenarios is clear: President Obama made recess appointments in order to fulfill his constitutional duty to enforce and administer the duly passed laws of the United States, whereas President Trump's hypothetical recess appointment would be an attempt to obstruct an ongoing investigation.[423]

On the other hand, the legal resolution in *Noel Canning* sanctioned the partisan obstruction of the appointments process by placing great emphasis on the Senate's ability to determine its own rules. This legitimation, therefore, gave the Senate a free hand to act however it pleases while providing the President little recourse to make valid constitutional claims regarding the staffing of the executive branch in the face of obstruction by a Senate minority. Hence, the legal resolution of the issue disguised — even subverted — the political dynamics at play. Perversely, the President's attempt to fulfill his constitutional duties was rendered an example of the imperial presidency while congressional abdication of its own prerogatives was elevated by the pretense of law.

CONCLUSION

The recess appointments controversy illuminates how certain understandings of the Constitution can undermine it in the long term. The Court's policing of the

[423] It is also true that Congressional Republicans, at this point, would do anything to support President Trump no matter how serious the action. The point here, however, is that it is possible to distinguish what should be considered proper uses of the power and improper uses of that power based on the circumstances that give rise to such appointments.

Constitution's formal boundaries certainly seems like a good approach because it ostensibly removes the messiness of politics from constitutional practice. The problem with this approach is that the legal line drawing does not remove politics from interbranch disputes. On the contrary, legal resolution pathologizes politics, subordinating other constitutional goods for the sake of legal certainty.

In the case at hand, the Court's protection of the Senate's power to advise and consent missed the fact that the deliberative process in the Senate had broken down due to partisan obstruction by a minority faction. The Court's line drawing thus prevented the President from making a constitutional case that, absent the deliberative and majoritarian will of the Senate to the contrary, the government needed to continue running. Hence, a minority faction did not have to justify its own behavior because it hid behind the letter of the law. Political contestation between the branches, wherein each of the branches would be forced to make constitutional claims and justify their behavior to each other, would re-open a deliberative space that was foreclosed by the Court's intervention into the matter. The Court thus legitimized the partisan obstruction of the Senate's prerogatives while preventing the President from ensuring the faithful execution of the laws. The legal parsing of the text to find the literal meaning of the Recess Appointments Clause, therefore, missed the underlying nature of the dispute and prevented the branches from engaging with each other politically.

This is not to say that a political understanding of the Constitution's separation of powers would solve the political problem of hyper-partisanship or would make politics less messy. But such an approach at least has the benefit of not doubling down on the

pathologies associated with hyper-partisanship, especially in the Congress where members seem particularly unwedded to the outlook and prerogatives of their own institution. The burden of politics, at the very least, forces political actors to make actual arguments unobscured by the pretense of law. The problem with considering the Constitution solely on a legal dimension, therefore, is that it flattens the relevant criteria for constitutional evaluation, neither considering constitutional ends nor how the Constitution establishes differing institutional structures to achieve those ends through conflict within and between competing institutions. In short, an overly legalized conception of separation of powers allows a letter-of-the-law reading of the Constitution to undermine the practice of constitutionalism.

Conclusion

The central claim of this dissertation is that disputes between the political branches regarding their textual boundaries should be left solely to the branches to work out, using the tools given to them by the Constitution, even when a dispute deals with a seemingly clear and determinate constitutional provision. This seems somewhat extreme, especially in a political culture that has largely accepted the fundamental notion of the Constitution as law. The premise that the Constitution is a legal instrument stems from the earliest days of the Republic when Chief Justice John Marshall construed the Constitution as such in *Marbury v. Madison* (1803) as he laid the predicate for the establishment of judicial review in that case. Over the course of the past 200 years the judiciary has increasingly gained in prominence up to the point of declaring itself the ultimate arbiter of constitutional meaning. For most of the Court's history, however, it did not settle interbranch disputes regarding the boundaries of the political branches.[424] As discussed in the introduction, the boundaries between the political branches, as the political science of *The Federalist* maintains, are not easily subject to legal determination. Even so, during the latter half of the 20th Century the Court extended its judicial prerogatives to boundary disputes between the branches. Few today would deny that such boundary disputes are well within the purview of the judiciary.

[424] Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980).

The notion, then, that it is possible to deduce standards from the legal text such that a violation of the clear terms of a clause might be more constitutional than adherence to them — as argued perhaps most strikingly in the chapter on recess appointments — seems to devalue the Constitution's legal status, amounting to law giving way to politics.[425] Indeed, the Court (albeit with differing interpretations of the scope of the Recess Appointments Clause) ruled unanimously that President Obama had contravened constitutional limits by making appointments during Senate pro forma sessions. Moreover, there seemed little, if any, question that it was the judiciary's prerogative to decide the case, especially since the case dealt with clear and determinate constitutional language. Given the clear constitutional commitment to make provision for appointments during congressional absence, the Court thus had to look to the text and to the intentions of the framers — as well as to historical usage and custom where the views of the framers failed to sufficiently illuminate — to determine what counted as a recess for the purposes of the Clause. The rationale for the Court's invalidation of the legislative veto was similar. The Presentment Clause presents a clear and determinate constitutional standard for lawmaking, clearly requiring that "Every order, resolution, or vote" comply with the Constitution's requirement for bicameralism and presentment. By drawing a legal line, the Court merely enforced constitutional procedures, disallowing what it viewed as an unconstitutional shortcut through the Constitution's legal framework.

[425] This objection was raised by committee member Josh Chafetz after reading the case studies. Much of the conclusion, therefore, will be an attempt to answer this objection, especially insofar as this objection hits at the heart of the argument of this dissertation.

And yet, there are many ways in which governmental practice — even since the time of the founding — departs from the Constitution's specific assignments of power. Such departures, while subject to robust criticism at times, are not viewed as constitutionally illegitimate. This dissertation, for example, examined executive agreements and treaties. While the Constitution only provides one method for entering into international agreements, requiring ratification by the consent of two-thirds of the Senate, the vast majority of international agreements today are conducted as executive agreements. And, in fact, only a small percentage of executive agreements receive any post hoc approval by Congress. Although some scholars and practitioners worry about the level of congressional oversight of such agreements and have proposed reform mechanisms to ensure greater accountability through advanced oversight and transparency mechanisms, no such reform proposals advocate moving away from the widespread use of executive agreements.[426] Executive agreements are viewed as essential mechanisms of modern government even if their constitutional pedigree is questioned by some (i.e. such agreements are justified by long-term practice and constitutional custom).

War powers is another area in which modern governmental practice departs significantly from the strictures of the text. While the Constitution grants Congress the power to declare war, it has not formally done so since World War II, and this even as the United States has engaged in active warfare almost continually since that time in conflicts

[426] Oona Hathaway, "Presidential Power over International Law: Restoring the Balance," *Yale Law Journal* 119, no. 2 (January 1, 2009); Curtis A. Bradley and Jack L. Goldsmith, "Presidential Control Over International Law," *Harvard Law Review* 131, no. 5 (March 2018): 1203–97.

in Korea, Vietnam, Iraq, and Afghanistan, among other conflicts. Again, while many scholars and practitioners are highly critical of the ways in which modern practice has evolved and would, for example, demand that Congress take a more active role over war powers, very few, if any, would suggest that the United States cannot engage hostilities unless or until Congress formally declares war.[427] To focus too narrowly on the literal letter of the law, in this way, would forego the institutional advantages the branches bring to the practical exercise of their war powers. Given the ostensible disconnect between the constitutional text and practice, scholars like Mariah Zeisberg instead seek to measure constitutional fidelity by analyzing how the branches wield their distinctive institutional capacities vis-a-vis each other in politics across time. If the branches do not abide by the literal strictures of the text — and, moreover, it would seem to be practically impossible to expect them to — this does not mean, in other words, that practice cannot be evaluated in any meaningfully constitutional sense.[428]

Of course, much of the divergence in these issues concerns the fact that the two examples cited above relate to the government's power in foreign affairs. The Court has developed a robust political questions doctrine for foreign affairs issues, recognizing that the foreign sphere is characterized by its unpredictability and volatility and that this context, generally speaking, is inappropriate for adjudication.[429] This reluctance on the

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[427] Louis Fisher, *Congressional Abdication on War and Spending*, 1st ed, Joseph V. Hughes, Jr., and Holly O. Hughes Series in the Presidency and Leadership Studies, no. 7 (College Station: Texas A&M University Press, 2000).

[428] Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton [New Jersey]: Princeton University Press, 2013).

[429] Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, N.J: Princeton University Press, 1992), 14–18; Ganesh Sitaraman and Ingrid Wuerth,

part of the judiciary, moreover, has extended beyond adjudication of the substance of foreign affairs issues to constitutional procedures, even though the enforcement of constitutional procedures would not entail, at least necessarily, policy-making judgments by the judiciary.[430] And yet, this dichotomy between the ways in which the judiciary allows the political branches to negotiate their textual boundaries in foreign affairs while more strictly construing their powers in the domestic context raises significant questions. The foreign affairs arena poses particular challenges to constitutional government, as discussed in the chapter on executive agreements. However, as argued in that chapter, the branches have at times negotiated these boundaries in salutary ways. Does the separation of powers require more legalization in the domestic context, especially if the political branches can be trusted to navigate the boundaries of their own respective power in foreign affairs? The reality is that while foreign affairs issues certainly stretch the constitutional order to its limits, the Constitution's political architecture is the same in both foreign and domestic contexts and there is no significant reason why the Court should be more reluctant to intervene in foreign affairs than in domestic contexts.

Noting the ways in which constitutional practice has already departed from the literal strictures of the text in important domains of constitutional practice cannot sufficiently answer the objection raised at the outset, especially insofar as that objection is ultimately motivated by the salutary attempt to maintain the fundamental character of

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"The Normalization of Foreign Relations Law," *Harvard Law Review* 128, no. 7 (May 2015): 1900; Jide Nzelibe, "The Uniqueness of Foreign Affairs," *Iowa Law Review* 89, no. 3 (March 2004): 941–1010.

[430] Made in the USA Foundation v. United States (2000).

the constitutional order. To what extent can governmental practice depart from the text and yet the Constitution still be said to govern political practice in any meaningful sense? To answer that question, this dissertation has stressed the values and purposes illuminated by, although not reducible to, specific allocations of power in an attempt to demonstrate how those values can — and should — guide the branches in their political negotiations regarding their boundaries. While the necessities of the moment might require deviating from the literal strictures of the text, the Constitution — and its specific assignments of power — should still guide the branches' political conflict. To use John Finn's formulation, the Juridic Constitution (the Constitution as law) and the political Constitution should exist in a symbiotic relationship.[431] An overemphasis on either law or politics can have deleterious effects. An overemphasis on law can make the constitutional structure too rigid and unadaptable to the needs of the moment. An overemphasis on politics, on the other hand, can make the branches inattentive to core constitutional commitments over time.

This latter concern is borne out, to some degree, in the case study on executive agreements. While this dissertation argued that executive agreements are consistent with, and limited by, constitutional structure, the use of executive agreements has also led to serious problems, especially with regard to congressional oversight. Executive agreements are largely a response to the need for governmental efficiency in foreign affairs. Given the high volume of international agreements entered into by the United

[431] John E. Finn, *Peopling the Constitution*, Constitutional Thinking (Lawrence, Kansas: University Press of Kansas, 2014).

States in the modern world, the branches have negotiated their boundaries such that the executive branch can enter into less consequential agreements without subsequent congressional involvement, as normally required by the Constitution. It is instructive to consider, for example, what benefits there could be from more strictly construing the Constitution such that the branches — absent perhaps a few exceptions — used the treaty mechanism for all international agreements, as the constitutional text would on its face require. There would be major inconveniences involved, of course, as the Senate would have to assent to high volumes of international agreements, including those that are seemingly insignificant and thus not generally deserving of substantial congressional involvement. But, on the other hand, it would be unthinkable that major international commitments such as the Iran Deal would be concluded by a mechanism other than a treaty — or that at least an agreement as consequential as the Iran Deal would go into force against the expressed will of a majority of both houses of Congress. While treaty exclusivity — or something close to it — would entail significant costs, constitutional structure would be maintained through the branches' more thorough attentiveness to textual requirements.

Of course, there are good examples of Congress demanding that more important international agreements be concluded with a higher threshold of post hoc authorization.[432] But as executive agreements have become standard practice during the

[432] Glen S. Krutz and Jeffrey S. Peake, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (Ann Arbor: University of Michigan Press, 2009); Curtis A. Bradley and Trevor W. Morrison, "Historical Gloss and the Separation of Powers," *Harvard Law Review* 126, no. 2 (2012): 411–85.

course of the last half century there is substantial evidence of a generalized lack of concern on the part of Congress with regard to such agreements. Indeed, as executive agreements have become accepted as completely constitutional — and have become standard practice —Congress has become less concerned with such agreements and has not ensured that it is kept apprised of the agreements made by the executive branch. Without a record of executive agreements Congress lacks the relevant information to assert that certain agreements should have been concluded as treaties, and that Congress will demand such in the future.

This digression is not intended as an argument against the use of executive agreements, especially since there are elements of modern practice that largely reflect constitutional commitments. Even so, it does demonstrate how inattention to the strictures of the Constitution can over time erode a commitment to the purposes of the Constitution if the branches get carried away by the conveniences of modern political practice. In other words, it is problematic if the branches are guided more by the way things are done or the exigencies of the moment than by the constitutional duties signified by the text. This, then, poses problems for those who would use history or long-time practice as a justification for the constitutionality of a particular way of doing things, as has often been the justification for executive agreements.[433] There is usually a close connection between the constitutional text and its purposes, and departures from the text

[433] Myres S. McDougal and Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," *The Yale Law Journal* 54, no. 3 (1945): 534–615; Bradley and Morrison, "Historical Gloss and the Separation of Powers."

can potentially frustrate the underlying purposes of the text. However, as argued above, treaty exclusivity would be practically impossible. Therefore, the branches would have to negotiate ways of handling international agreements which were capable of handling the required volume. For such an accommodation to be constitutional, however, it must be faithful to the underlying purpose and logic of the text, even as it departs from the literal strictures of the text.

The answer to the objection raised at the outset against the proposition that it is possible to deduce standards from the text such that a clear violation can be considered the more constitutional action than strict adherence to the letter of the law is that such violations of the text should be circumscribed by the circumstances that give rise to them and the kinds of arguments advanced to justify such departures. Furthermore, when a branch violates the strictures of the legal text it is incumbent upon that branch to justify its actions. Such justification, moreover, should be forthcoming given the fact that the other branch, especially if it disagrees with the action taken, will contest the legitimacy of the action by pointing to the requirements of the law. Each branch, moreover, has determinate political tools it can wield to advance its arguments in politics. In other words, the strictures of the legal text generally provide a baseline for action and, consequently, departures from that baseline generally require significant justification. However, to leave the adjudication of the question solely to legal arguments — without attention to the political circumstances or the ways in which such actions are meant to achieve constitutional ends — risks undermining constitutional ends and obscuring the political dynamics at play.

Perhaps the most famous example of a departure from the strictures of the legal text and its subsequent, and generally accepted, justification is President Abraham Lincoln's defense of his order to suspend Habeas Corpus, along with several other wartime measures that exceeded his normal powers, at the outset of the Civil War. At the outbreak of the Civil War, Lincoln acted decisively to meet the needs of the nation, believing that his oath to "take care that the Laws be faithfully executed" and to "preserve, protect, and defend" the Constitution required actions that would under normal circumstances be considered unlawful. The importance of vigorous executive action without legal sanction, moreover, was made all the more necessary by the fact that Congress was out of session and could not be safely convened in time to exercise its powers. Given congressional absence, Lincoln subsequently argued to a special session of Congress, that "no choice was left but to call out the war power of the government," and that although some of the actions taken might not be "strictly legal" they were justified by "what appeared to be popular demand and public necessity, trusting then, as now, that Congress would readily ratify them."[434] Congress subsequently ratified most of the wartime measures Lincoln had already taken, but did not sanction the President's suspension of Habeas Corpus for another two years, in large part due to concerns that to provide specific statutory authorization could undermine the flexibility and discretion the President needed to wield the power effectively by suggesting that the President did not

[434] Abraham Lincoln, "Message to Congress in Special Session," July 4, 1861. Retrieved at: https://teachingamericanhistory.org/library/document/message-to-congress-in-special-session/

have the power in the first place.[435] The President and Congress thus negotiated the limits of their respective powers to ensure that the powers of the national government could be exercised as effectively as possible given the dire circumstances.

Chief Justice Taney, however, ruled in *Ex Parte Merryman* (1861) that Lincoln's suspension of Habeas Corpus was unconstitutional because only Congress could suspend Habeas Corpus, noting that the suspension Clause is in Article I and that "[t]his article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department." Lincoln and Congress subsequently ignored the ruling. It is of course true that when Lincoln defended the suspension to Congress, he gave an exhaustive technical legal argument regarding the president's power to suspend Habeas Corpus. But beyond the technical, and potentially contestable, legal argument, Lincoln provided a constitutional justification for his actions animated by a concern for overarching constitutional purposes and the concomitant duties of his office, asserting that the actions taken, even if violating the strict letter of the law, were necessary to preserve the constitutional order:

> The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the states. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, Are all the law *but one* to go unexecuted, and the government itself go to pieces lest that one be violated? Even in such a case,

[435] George C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, Bulletin of the University of Wisconsin, no. 149. History series. v. 1, no. 3 (Madison, Wis, 1907), 239–45; James A. Dueholm, "Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis," *Journal of the Abraham Lincoln Association* 29, no. 2 (Summer 2008): 49–55.

> would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?[436]

Lincoln thus argued the constitutional merits of his case before Congress and the public, providing publicly accessible reasons for why a violation of the strict letter of the law, if it could be so construed that the law in fact had been violated, was justified by the particular circumstances that gave rise to the suspension. To put it another way, the fact that there *is* a Habeas Corpus suspension clause in the first place points to the fact that the framers recognized that there might be times when the government needs to effectively wield this power, especially when courts of law cannot properly function. After determining that such a power, in certain defined circumstances, is necessary, it is then important, as a second-order consideration, to decide which branch is best suited, generally-speaking, to exercise such a power. There are of course good reasons why the legislature, as the most broad-based, publicly accountable body, should have the power, making it less likely that such a power could be abused by executive discretion. But, as Lincoln queried, should the government be prevented from exercising an essential constitutional power if the branch formally granted the power cannot meet to exercise it to the detriment, even destruction, of the constitutional order itself?

The Habeas Corpus suspension case is instructive because it demonstrates how the branches can negotiate their respective boundaries in politics, motivated by the constitutional principles at stake and constrained by the relevant circumstances. While the president exercised a power that he conceded he might not have under normal

[436] Lincoln, "Message to Congress in Special Session."

circumstances (even as he argued that, in a technical sense, he did in fact have that power) he subjected his actions, and his arguments on behalf of them, to post hoc congressional scrutiny. Congress, in its turn, after deliberating on the appropriate scope of the president's authority, recognized the legitimacy of those actions in light of the circumstances. Legal analysis concerning which branch appropriately has the power could not ultimately answer the question of whether the president's action was constitutionally legitimate. This is true regardless of how the Court decided the case. Indeed, had the Court provided judicial sanction of the president's action (finding that the president does in fact have the power in a legal sense) this could provide legal cover for a future president to wield the power in circumstances less appropriate or dire without having to similarly make constitutional justifications to Congress and to the public, relying instead on judicial precedent for support. By leaving the issue to politics (and in this case refusing to defer to the judiciary's pronouncement on the matter) the political branches argued about the constitutional purposes undergirding the text, making politically contestable claims to each other that could be evaluated by each other, and, of course, ultimately by the public. The fact that Lincoln, at least ostensibly, violated the letter of the law compelled him to justify his actions, but to do so not based solely on technical legal reasoning but with regard to the purposes his actions were meant to fulfill. These claims, moreover, were contestable and could have been subsequently repudiated by Congress.[437]

[437] Although one might object to this argument that the bulk of Lincoln's message to Congress was a highly technical and legalistic argument about why he had the power that was exercised, this argument can

This example stands in stark contrast to the two case studies in this dissertation wherein the judiciary intervened. In both of those cases — recess appointments and the legislative veto — the legal resolution greatly distorted the actual political dynamics between the branches, especially insofar as the judicial frame, focused as it was on the constitutional text, was inattentive to larger constitutional purposes. Moreover, this inattentiveness to larger constitutional purposes and the ways in which the political branches could have negotiated their boundaries in politics (and, in fact, had so negotiated in the case of the legislative veto) led to the subversion of constitutional purposes. A literal focus on the constitutional text, in other words, led to outcomes that were less constitutional even as these legal resolutions were imbued with the pretense and high-mindedness of law.

In the case of the legislative veto, Congress and the president had negotiated a decades-long constitutional settlement wherein Congress delegated its legislative power to the executive branch while retaining post hoc oversight and accountability for its delegated lawmaking power. Congress thus greatly empowered the executive branch as it delegated its lawmaking prerogatives to the president and other executive branch departments and agencies, making, in many respects, the president, and his subordinates, legislator-in-chief. What is particularly striking about the negotiated settlement between

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go too far. Indeed, given the contestable nature of the President's actions he was thus compelled to place himself on the firmest constitutional foundation possible. Thus, he made arguments both legal and constitutional. The constitutional arguments, however, were crucial to the public deliberations on the matter because those arguments could be used to justify the constitutional necessity of his actions regardless of whether they were technically legal. The fact that Lincoln was induced to make such substantial justifications of his actions points to the fact that violations of the letter of the law compel significant justifications.

the branches is the ways in which Congress, in particular, was concerned about its larger constitutional purpose (to ensure that laws are based on the deliberative will of the majority expressed through the institution designed to make provision for its expression) even if it was not completely self-conscious of this. Indeed, when Congress first delegated legislative power to the president subject to a legislative veto it engaged in days of sustained and heated deliberations about whether the *delegation* of its lawmaking power was constitutionally appropriate or whether it amounted to abdication of its constitutional duties to ensure that laws reflect the deliberative will of the majority expressed by the institution designed to make provision for this political perspective. The legislative veto was adopted with far less fanfare as it was merely an attempt by Congress to achieve the aims sought by the delegation in the first place without abdicating its constitutional function through the delegation of its power.

The branches' negotiated settlement regarding their roles in the lawmaking process remained largely confined to the realm of politics, in which negotiation was animated both by concerns for achieving important and legitimate governmental ends and with maintaining constitutional structure. It is true that presidents at times characterized the legislative veto as a congressional usurpation of their executive power — though, of course, it is not all that surprising that presidents would attempt to construe their power broadly in an attempt to get Congress to delegate with no strings attached. Presidents acquiesced, however, when faced with the choice of a legislative veto or congressional refusal to delegate power at all. In short, the branches negotiated a settlement that greatly empowered the executive while retaining legislative oversight of its delegated

prerogatives, and both branches accepted the settlement in practice, especially insofar as both branches stood to gain from their negotiated settlement. Ambition thus served to counteract ambition, the wedding of institutional prerogatives to the ambition of officeholders serving to sustain constitutional structure even as the branches adapted their institutions to meet the needs of changed circumstances. This political negotiation, of course, contravened the literal letter of the Presentment Clause, but it preserved the larger purposes by ensuring the substantive involvement of both branches in the lawmaking process.

As shown in the case study, however, the judicial invalidation of the legislative veto was inattentive to the larger purposes the branches were trying to achieve through its use (the preservation of constitutional structure as the branches met the challenges of modern governance). By focusing on the literal strictures of the law, the Court thus undermined the constitutional structure it purported to protect, especially since the Court's ruling did not even acknowledge how the veto fit within the backdrop of delegation. Hence, the Court continued to allow widespread delegation — and the concomitant blending of legislative and executive power in the executive branch and the administrative state — while cutting Congress off from its delegated functions. The larger purposes of the separation of powers — which the branches had successfully maintained through their own political interactions — were thus undermined by the judiciary's overly literal rendering of the Presentment Clause without attention to the larger purposes of that Clause and how the relevant political circumstances led the branches to work in politics to achieve governmental ends while maintaining the

substantive involvement of both branches in lawmaking. It is of course true that some critics of the legislative veto — such as the late Antonin Scalia, prior to his appointment to the Court — viewed its invalidation as a first step towards rolling back widespread delegation, especially insofar as the legislative veto made it easier for Congress to delegate.[438] While there might be good reasons for Congress to take more ownership of its legislative prerogatives — as Jessica Korn, for example, has argued — this is a prudential objection rather than a principled constitutional one.[439] Indeed, if the branches in their political negotiations determine that the only way to effectively accomplish some governmental objective is through delegation, then it is incumbent upon the branches to determine how to accomplish that goal while also ensuring that such delegation is reconciled to constitutional structure. The legislative veto, in this way, is a primary example of the ways in which the constitutional order — as *The Federalist* argued — is adaptable to the various crises and exigencies of unforeseen circumstances while maintaining its structure through the political negotiation of the branches. Moreover, the judicial resolution, based on the literal meaning of the Clause, feeds the view that the Constitution is the enemy of good and effective government because it is too static and, therefore, unadaptable to the needs of contemporary government.

Similarly, with recess appointments, the judicial resolution of the issue — based on the technical meaning of recess — was not attentive to the larger purposes signaled by

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[438] Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload," *Regulation: AEI Journal on Government and Society*, 1979.
[439] Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*, Princeton Studies in American Politics (Princeton, N.J: Princeton University Press, 1996).

the Clause: that the president needs to staff the government to keep it functioning when Congress is unable to fulfill its constitutional obligations. The Court's resolution of the Clause based on its literal meaning — the question thus turning on what constitutes a recess for valid recess appointments — did not take into account the larger political context that gave rise to the challenged recess appointments in the first place: partisan obstruction by a minority faction, wielding institutional procedures to grind the government to a halt, and perpetually frustrating the will of the majority which would have easily confirmed the recess appointed nominees. Given that the recess appointments were, in fact, technically made during a Senate session, the legal resolution made it appear that the president had acted lawlessly, unconstitutionally encroaching upon congressional prerogatives. The legal resolution of the issue thus meant that the government was not staffed as hyper-partisanship in Congress prevented it from fulfilling its constitutional duties, and as the president was prevented from responding in politics to this congressional abdication. The judiciary's parsing of the legal text thus preempted political conflict that, while mediated by the text, could have underscored the Constitution's positive purposes in light of the particular circumstances.

The argument here is not that the Court should have decided the case but resolved it in the other direction. Rather, legal line drawing in either direction — to sustain the appointments or to preclude them — would prove problematic insofar as such line drawing is inattentive to the political circumstances that could give rise to and justify such recess appointments — or could make such appointments constitutionally invalid. The Court's invalidation, as demonstrated in the case study, was deeply problematic

insofar as it precluded the President from responding to the obstruction of a partisan minority in Congress. If the Court had decided the case in favor of the president, on the other hand, future presidents might rely on the Court's precedent sustaining a broad construction of the Recess Appointments Clause in cases where the political circumstances do not warrant or justify such appointments. In such a case the president could more easily rely on judicial precedent rather than having to press a constitutional argument.

The Federalist, time and again, explains how the Constitution is designed to achieve certain ends, not merely to restrain the power of government in advance of unforeseen circumstances. In both of these cases, on the other hand, larger constitutional objectives were obscured and undermined by a narrow focus on the literal strictures of the law. The focus on the text, in other words, was divorced from the larger purposes of the constitutional order, those purposes signaled by but not reducible to their textual instantiations. Political contestation, on the other hand, enables, even requires, the branches to advance arguments about their respective behavior in light of the political and constitutional aims they seek to achieve, embedded within particular circumstances that constrain and limit the range of acceptable actions and arguments on behalf of those actions. Brightline, legalistic rules, in other words, provides no space for constitutional adaptation to the contingencies that are endemic to politics.

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This latter point bears some elaboration even if to do so is merely to nuance and emphasize aspects of the above explication. Indeed, the type of arguments the branches

make in constitutional conflict regarding their powers are not necessarily self-consciously constitutional in the way such reasoning is typically understood. This is an important point to briefly elaborate on because the case studies shed light on how the political branches reason (or should reason) about the Constitution differently than the judiciary. It is typical to think of constitutional reasoning in legal terms even when discussing the political branches' role in constitutional interpretation. For example, while departmentalists —similarly to the argument of this dissertation — encourage officeholders in each branch to interpret the Constitution for themselves rather than to submit to the Supreme Court's interpretations, such interpretive pluralism is still, at least generally speaking, conceived in the same way as the Court reasons about the text, or is concerned with how the branches respond to the issues that are before the Court.[440] The political branches, in this view, are encouraged to offer competing perspectives on and arguments about constitutional meaning rather than to submit to the Court as the sole or final interpreter of the text. Lincoln is thus held up as an exemplar of constitutional reasoning for his opposition to the Supreme Court's *Dred Scott* decision insofar as he publicly argued why the Court had wrongly decided the case and, therefore, why the Court's decision should have no precedential value, only applying to the parties in the case.[441] Similarly, others have positively characterized the ways in which the political

[440] John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca [N.Y.]: Cornell University Press, 1984); J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System*, Constitutional Conflicts (Durham: Duke University Press, 2004); Neal Devins and Keith E. Whittington, eds., *Congress and the Constitution*, Constitutional Conflicts (Durham [N.C.]: Duke University Press, 2005).
[441] Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (Totowa, N.J: Rowman & Littlefield, 1986), 96–100.

branches challenged the *Roe v. Wade* decision, especially as Congress held hearings in the 1980s on how the Constitution should be rightly understood on this issue.[442] Such interpretive pluralism is thus seen as increasing the deliberative space for contesting and constructing constitutional meaning over time, involving a broader swath of the people in conversation about what the Constitution means.[443]

In the kind of disputes regarding the political branches' powers vis-a-vis each other examined in this dissertation, on the other hand, discourse is not necessarily as self-consciously constitutional — i.e. tied to textual interpretation. It is true that the text guides and constrains the branches' political deliberations about the limits of their powers vis-a-vis each other. But beyond this, the branches are (or should be) motivated by the purposes and duties of their institutions. So, for example, when the legislative veto was adopted Congress did not debate its textual merits so much as see it as a way to both achieve constitutional ends without abandoning its constitutional role. The veto was thus a way in which members of Congress were induced to care for the prerogatives of Congress as the lawmaking institution. Similarly, presidents accepted such vetoes in order to gain more power insofar as the legislative veto merely conditioned power that Congress could otherwise retain if the president objected. In this way, the negotiations on the part of both branches were animated by the political ambition of officeholders, that

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[442] Susan Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (Lawrence, Kan: University Press of Kansas, 1992); Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration*.
[443] Finn, *Peopling the Constitution*, 135–44.

ambition inextricably wedded to the purposes and prerogatives of the institutions they inhabited.

In the recess appointments case, President Obama did not make a self-consciously constitutional argument when he made the controversial appointments. Rather, he asserted that pro forma sessions hardly constituted a legitimate session of the Senate insofar as a single senator entered the chamber every few days to gavel it in and out of session even as Congress conducted no official business for over a month. The action, and the argument justifying it, called into question congressional behavior, but not in a highly technical and legal way (until the Court intervened and induced the branches onto the legal plane). Left to political contestation, the President could have persisted in making the claim that Congress was not exercising its authority in an appropriate fashion and that congressional abdication justified the administration's extraordinary actions. Moreover, a president would be limited in the kinds of arguments he could make if such appointments were made to defy or circumvent the deliberative and majoritarian will of Congress. And in such a case, moreover, it would be difficult for the president to get away with such appointments given that Congress could defend the majoritarian judgments of its institution.

Finally, while Congress utilized an approval mechanism for the Iran Deal that did not ultimately realize the positive purposes of the Treaty Clause's inclusion of Congress in the first place, Congress's political intervention was, at least rhetorically, premised on the notion that such a deal would not prove to be durable without congressional buy-in. As discussed extensively in the case study, the framers included the Senate in order to

buttress and solidify American foreign policy commitments in light of the fact that, without such institutional provision, the mutability of the law more likely to occur in republican forms of government could undermine the trust of foreign nations due to a lack of consistency. While President Obama had a plausible legal argument regarding his authority to unilaterally enter into the Iran Deal, Congress contested that legal claim with a political argument that reflected fundamental constitutional commitments. The extent to which Congress followed through on this claim is irrelevant to the fact that Congress was in fact motivated by what appears to be a constitutional concern about the purposes of having Congress involved in international agreement-making in the first place.

The essential point here is that the officeholders in the different branches are motivated by the prerogatives and duties of their offices as much as they are by the text itself. Moreover, the text points to constitutional commitments that guide and constrain political contestation even as the branches' political arguments move beyond the literal strictures of the text. Insofar as the branches are motivated by their political prerogatives — those prerogatives shaped by the branches' differentiated structures, tasks, and duties — the constitutional text provides resources for argumentation as they engage in politics. Political contestation, moreover, is likely to result in robust reason-giving and a more candid exchange about the motives behind institutional actions. The president can persist in refusing to abide by the will of Congress. Congress, on the other hand, has powers up to and including impeachment to weigh and balance the president's claims vis-a-vis its own deliberative perspective. The iterated political arguments made by the branches in different stages of political contestation thus move the branches off their legal scripts to

more thoroughly justify their actions in light of the other branch's counterclaims, especially as political contestation moves from a low to a high level of intensity. In this way, conflict between the branches induces candor because the branches, in their public cross-examination of each other, are moved to justify their actions and behavior, submitting the merits of their actions and arguments to a dynamic political process that can end with impeachment. Jeffrey Green argues that political conflict can induce candor. For example, a cross-examination between candidates on stage — as opposed to an audience Q&A or questions from a moderator — pushes candidates away from their pre-written script insofar as they are faced with pushback in the moment.[444] The argument here is similar. In the back-and-forth of politics, that political contestation structured by determinate constitutional tools the branches can wield to advance their arguments vis-a-vis the other branch, it is more likely that a branch hiding behind a valid assertion of legal power, in a technical sense, might be revealed for using that power inappropriately. Recourse to legal adjudication cannot illuminate this as thoroughly as legitimate contestation that calls those motives into question. Settling the dispute based on a literal interpretation of the text precludes this robust reason-giving enabled and fostered by the back-and-forth of political contestation, and can hide the ways in which a branch might wield a valid legal argument to otherwise obscure an arguably improper use of that power — as illuminated in the recess appointments case study.

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[444] Jeffrey E. Green, *The Eyes of the People: Democracy in an Age of Spectatorship* (Oxford ; New York: Oxford University Press, 2010), 185.

It is worth briefly dwelling on whether the political contestation between the branches is sufficient to prevent abuses of power such that judicial intervention would provide better constitutional outcomes. Leaving boundary disputes to the political process no doubt provides opportunities for improper uses of power. Indeed, the concern with enforcing the law in such interbranch conflicts is often motivated by the salutary concern that political contestation is about whatever the branches can get away with. In politics, however, an improper use of power is less easily defended by recourse to viable constitutional arguments, especially since the other branch has plenty of institutional tools it can use to advance its competing perspective in politics, pressing the first branch to justify its actions.[445] It is possible, however, that the political process might not always constrain abuses of power. For example, if Congress impeaches a president after he refuses to spend appropriated funds in the manner specified by Congress (or refuses to allow any member of his staff to testify before Congress), what is to keep the president from, say, dispatching troops to surround Congress, thus ending the argument?[446] This is perhaps an extreme example, but the answer to this objection is that a president that refuses to submit to the political judgment of Congress — backed up by the viable threat of impeachment — has no more incentive to abide by a ruling of the Supreme Court curtailing the president's power. In fact, Congress has far greater tools to constrain executive abuse with its power of the purse, its investigative tools, and its power to

[445] Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (Yale University Press, 2017); William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton [N.J.]: Princeton University Press, 2003).
[446] This is a question Josh Chafetz posed upon reading the case studies.

impeach than does the Court with its mere power of judgment.[447] If the Constitution were to fail entirely — insofar as the branches decide to ignore constitutional strictures up to the point of refusing to leave office — then it is true that a political conception of the separation of powers might be insufficient to preserve core constitutional commitments. But neither is the Court likely to restrain such brazen abuses of power with its rulings. In other words, the argument of this dissertation has been that in the ordinary practice of constitutional government, leaving interbranch disputes to be worked out between the branches works better than legal settlement insofar as legal settlement is inattentive to the political goods that can be pursued in interbranch conflict.

Leaving such extreme scenarios to the side, the political conception of separation of power articulated in this dissertation better preserves constitutional structure than an overly legalized conception because, left to politics, the branches are induced to embrace a more capacious conception of their powers, channeling the purposes to which their powers are directed based on the concomitant duties of their offices. If the branches are induced to legalize their disputes however, they can potentially lose the capacity to reason politically about the purposes underlying the text as opposed to understanding their powers solely in legal terms. In this way, a robust political conception of separation of powers *tends* to the overarching commitments of the constitutional order in a way that a narrow emphasis on law can obscure and potentially undermine — as shown in the case studies.

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[447] See *Federalist* 78.

Indeed, today certain conflictual possibilities are completely off the table insofar as officials within both of the political branches — or, for that matter, the public at large — would not have the political, or constitutional, imagination for them. So, for example, when Senate Majority Leader Mitch McConnell and Senate Republicans refused to hold hearings, or even meet with Supreme Court nominee Merrick Garland, President Obama had no recourse but to allow the Senate to kill a nomination without any substantive debate about the merits or qualifications that would render such a choice worthy or unworthy for the Supreme Court. The Senate Republicans thus pushed the decision to the electorate, claiming that the People would decide who the next Supreme Court justice ought to be. This decision by the people, however, would have to be made without reference to any substantive Senate deliberations that could guide the public on the salient issues of the choice.

In a political culture that understands the ways in which the branches share power to provide certain political goods, as opposed to mere power politics and checking and balancing, the President might have been able to issue an ultimatum, threatening to install Merrick Garland on the Supreme Court if the Senate refused to deliberate. Indeed, the President could claim that the Senate had refused to hold hearings or meet with the nominee because they were afraid his virtues as a nominee would be made so manifest in that deliberative process that the Senate would have no choice but to confirm him (especially as fair-minded and moderate Republican Senators peeled away and agreed to vote to confirm). By claiming that Senate silence on the issue could not prevent the nomination (or that such silence represented tacit consent), the President could have thus

induced substantive political conflict about the nature of the branches' respective powers in the nomination process — that such powers are marked by duties, not just checks — as well as about the nature of the particular choice. It is not hard to see, however, why such a choice was never publicly contemplated, or to see how such a move would be viewed as outside the scope of acceptable actions, even as, in theory, such a move would, arguably, have been no less constitutional than Congress's willful abandonment of its own constitutional duties based on a narrow conception of its powers

The point here is to show how an overly literal notion of the branches' shared powers — and a focus solely on the checking function of institutions — deprives the political branches, and the public, of the imagination for how conflict between the branches can serve positive ends and how assertions of legal power, as opposed to political conflict, enervates political life of the reason-giving and argumentation necessary for informed political decision-making. In other words, if separation of powers is understood purely in terms of constraint, then what was actually an abdication of constitutional duties by the Senate is viewed as constitutionally legitimate even though it deprived the constitutional order of the political goods that come from involving the Senate in the process in the first place. In short, in the ordinary practice of politics, a more political conception of the purposes of separation of powers — and institutional conflict appropriate to that conception — feeds a robust political life that is undermined by too narrow a focus on law. Over time, that narrow focus erodes the ability of the branches to engage in substantive political conflict, which, in turn, erodes a conception of the positive functions the branches serve in the constitutional order. As Jeremy Waldron

writes, separation of powers as a constitutional way of bringing about positive goods through the practice of government becomes enervated of any content that would give meaning to political life such that today it is perhaps only possible to speak elegiacally about the separation of powers as a concept.[448]

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It is also worth noting the ways in which a political conception of separation of powers enhances democratic accountability by inducing the branches to contest their boundaries in language that is accessible to ordinary voters. This, of course, is a related point to what has already been written, and so it does not warrant much elaboration. The link between the governing apparatus and the people should not be overlooked. Ultimately, the public votes in regularly sequenced elections, evaluating and holding the government accountable. It is essential, therefore, that the public be adequately informed about the nature of the political disputes occurring within and between the political institutions of the national government. Insofar as the branches recur to overly legalistic conceptions of their power in their political disputes — induced by the judiciary, or otherwise, to focus on the literal instantiations of their power without recourse to the broader purposes illuminated by those powers — public discourse takes on the technical and specialized language of the legal profession, thus making politics the province of lawyers and legal experts. It is not hard to see how this can leave the public uninformed and disaffected by politics.

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[448] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, Massachusetts: Harvard University Press, 2016), 71.

This was perhaps borne out most clearly in the recess appointments case study wherein the branches were induced to make technical legal arguments about what constitutes a recess in ways that obscured the actual political dynamics at play, precluding publicly accessible reasons that could have been made to justify a departure from the legal text in that particular instance. Most citizens could have understood arguments about the purpose of the Clause — that duly constituted offices need to be filled, even when Congress cannot act — and the source of the problem — that a minority in the Senate was endlessly preventing consideration of appointments. Only a few experts, however, would be able to take the time to understand or fairly evaluate the complex legal and historical claims which were the basis of the Court's decision. Broader political discourse was enervated of the vocabulary that would be publicly accessible and thus more easily evaluated by voters. Even more problematically, the legal resolution provided an apparently simple narrative — that the President was subverting the Constitution — which obscured and distorted the actual political dynamics animating the conflict in the first place. Thus, the legalization of the conflict not only shut voters out of the reasoning behind the Court's decision, but also distorted their understanding of the political conflict. Leaving such disputes to be worked out between the branches, on the other hand, opens space for a publicly accessible politics that leaves the electorate better informed about the nature of interbranch disputes, thus enabling them to better perform their electoral duties in regularly sequenced elections.

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The purpose of this dissertation has been to illuminate the type of politics signified by the text but not reducible to the literal instantiation of its textual commitments. The argument elucidated above and in the case studies is that the branches should negotiate their textual boundaries through political conflict and negotiation, that conflict structured and animated by the purposes underlying assignments of power. In other words, the type of constitutional reasoning appropriate to the judiciary is inappropriate for the political branches in their own interactions regarding their textual boundaries because legal reasoning is about drawing bright-line rules that settle the meaning of the constitutional text. Legal settlement, however, is problematic when it comes to disputes between the branches because a focus on the literal strictures of the text may not be attentive to the particularities of the situations that give rise to, and circumscribe, departures from the text. Given that both branches have determinate political tools to contest the other branch, moreover, there is often no need to have a referee intervene in the dispute, especially insofar as legal resolution cannot weigh and balance the branches' competing claims as effectively as the branches can in politics.

For example, as briefly mentioned in the introduction, it is impossible to determine through adjudication what the scope of executive privilege should be in any meaningful sense. Indeed, both branches have potentially legitimate claims to information. The president might have a legitimate claim to withhold information for national security reasons, worrying that the information, sensitive as it is, might be too easily leaked by members of Congress. Conversely, Congress can hardly do its job without information about how the executive branch uses its discretionary authority. Its

investigatory powers, in other words, are essential mechanisms so that when Congress legislates it can do so in light of the actual facts on the ground. Congress, therefore, has potentially legitimate claims to information that it can press against the president's purported need to withhold such information. While presidents might at times have legitimate claims to withhold information, a president who categorically refuses to provide any information to Congress in any situation might well be impeached. Ultimately, different situations — and the kinds of arguments that the branches can make in light of those circumstances — will naturally result in different accommodations between the branches in different instances as they press their claims against each other in politics. It would be difficult, on the other hand, for the judiciary to intervene given the politically sensitive nature of these competing claims from the branches.[449] Rather, the best test of the branches' competing claims is how far each branch is willing to go to advance its argument, up to and including impeachment. Legal resolution cannot serve as an adequate measure for how far a branch is willing to go to press its case in front of the public from a low to a high scale of political conflict.

This does not mean, however, that the judiciary should never intervene in separation of powers disputes. In *United States v. Nixon* (1974), the Court acknowledged that there was no legal principle that could determine when executive privilege is constitutionally legitimate but nevertheless ruled that in the particular instance President

[449] Gary J. Schmitt, "Executive Privilege: Presidential Power to Withhold Information from Congress," in *The Presidency in the Constitutional Order*, ed. Jeffrey K. Tulis and Joseph M. Bessette (Baton Rouge: Louisiana State University Press, 1981); David A. Crockett, "Executive Privilege," in *The Constitutional Presidency*, ed. Jeffrey K. Tulis and Joseph M. Bessette (John Hopkins University Press, 2009).

Nixon had to turn over tapes because they were relevant to ongoing criminal proceedings and thus implicated the prerogatives of the judiciary and the rights of individuals to have a fair and speedy trial with the relevant evidence available. Such a determination by the Court, however, was not a bright-line rule settling the general boundaries between the political branches in ways that undermined the core political prerogatives of the branches to weigh and balance competing claims in different political disputes wherein the merits of the claims could result in different outcomes. Rather, the Court intervened on behalf of its own prerogatives but did so in a narrowly circumscribed manner given the politically contentious nature of the dispute.

The legislative veto case study similarly illuminates what would have been an acceptable judicial intervention in the case. As argued in that case study, the specific veto at issue in the *Chadha* case was illegitimate because it altered the rights of individual citizens in particular circumstances. Even if the government had gone through the full legislative process, with a bill to deport Jagdish Rai Chadha passed through Congress and presented to the president for his signature, this could have been struck down as a bill of attainder.[450] In other words, the Court was right to invalidate this particular use of governmental power. The Court, however, failed to distinguish the particular legislative veto in the case from those merely conditioning Congress's delegated legislative power. By failing to so distinguish, the Court cast aside hundreds of laws in a breathtakingly broad decision.

[450] Prohibited under Article 1, Section 9.

The distinction thus made in the discussion of both executive privilege and legislative veto suggests that the Court's interventions should be directed to the ways in which governmental policy applies to citizens rather than to policing the boundaries of the political branches in general. In other words, if the political branches, generally speaking, have the power to do something, it would be inappropriate for the Court to intervene in disputes regarding which branch should have appropriately exercised the power.[451] As amply demonstrated, the branches have determinate political tools to negotiate their boundary disputes in such general circumstances. Beyond such narrowly defined circumstances, however, the judiciary should largely refrain from interfering in such disputes, treating separation of powers conflicts across the board as it generally has done in the foreign affairs arena. Indeed, the Court has been reluctant to interfere in foreign affairs disputes — even to enforce ostensibly clear and determinate constitutional language — due to what it takes to be the political nature of foreign affairs, noting its lack of institutional competence to enforce textual boundaries without upsetting the political wisdom exhibited by the branches in their own negotiations. As argued above, however, such adjudication similarly frustrates the negotiation of the branches in the domestic context as well. Insofar as the rights of citizens are not affected by a problematic application of governmental power, political disputes between the branches are best left to their own negotiation or conflict.

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[451] Choper, *Judicial Review and the National Political Process*.

In concluding this dissertation, it is worth returning to some of the themes from the introduction, especially regarding the nature of the separation of powers system embodied by the Constitution. The central argument of this dissertation has been that the separation of powers system is not reducible to a set of legal provisions to be parsed by jurists. Rather, the Constitution set into motion a dynamic political order in which the branches should determine the limits of their respective powers in politics. While the constitutional text constrains action, its constraints are better understood as channeling, shaping, and directing behavior rather than merely placing a priori limits. This argument is based on Tulis and Mellow's account of how the constitution departed from separation of powers as it had been traditionally understood — as a strict division of legislative, executive, and judicial power — and replaced it with a fundamentally new political system wherein the branches would work in politics to adapt the constitutional framework to the exigencies of times to come. The case studies demonstrate how understanding the Constitution primarily in terms of its legal assignments of power — and thus enforcing textual boundaries based on their most literal terms — misunderstands the nature of the constitutional design and, consequently, undermines the purposes of the constitutional order. In this view, textual boundaries themselves are subject to political contestation insofar as legally enforcing interbranch disputes regarding such boundaries can undermine the higher order commitments of the regime.

But if the constitutional design was intended to be a political architecture fundamentally different from separation of powers as it had been traditionally understood prior to the founding, then why has this conception been largely misunderstood? The

answer to this question is not obvious. Part of the answer, however, is that the argument of this dissertation is not originalist per se. An examination of the intellectual history regarding the separation of powers idea as well as the records of the Constitutional Convention and subsequent ratification debates certainly does not provide conclusive evidence for the political architecture conception of the separation of powers system articulated here. Indeed, John Manning notes how little consensus there was both prior to and during the framing of the Constitution on what an adequate separation of powers design requires.[452] The constitutional design, in his characterization of it, is merely a series of various textual provisions that are each the result of considerable compromise. But, Manning argues, there is no overarching separation of powers principle at the heart of American constitutionalism beyond these various and distinct compromises that together constitute the whole enterprise.[453]

This dissertation thus relied on *The Federalist* for what could be taken to be the best account of the system irrespective of the specific views and intentions of the framers. And, indeed, given that *The Federalist* was not widely read outside of New York during the ratification debates, the account it offers of the constitutional design cannot necessarily be seen as indicative of the views or specific intentions of the framers as a group. Even so, as Herbert Storing notes, the authors of *The Federalist*, in providing an account of the nature of the Constitution, saw better and farther, drawing attention to

[452] John F. Manning, "Separation of Powers as Ordinary Interpretation," *Harvard Law Review* 124, no. 8 (2011): 1993–2005.
[453] Manning, 1944–45.

what was "fundamental" about the design rather than merely expressing how that design was commonly understood at the time.[454] For this reason, *The Federalist* has proven to be an enduring and widely-read interpretive guide to the Constitution.

However, *The Federalist* never explicitly, or even self-consciously, lays out the political architecture view of the separation of powers system relied upon in this dissertation. And, in fact, its rhetoric at times seems to endorse the constraints-oriented conception critiqued here, especially in the essays devoted specifically to explaining the nature of the Constitution's separation of powers. Indeed, in contesting the critiques of the Anti-Federalists who asserted that the proposed Constitution violated separation of powers and would thus be unsafe repository of the people's trust, Madison responded by arguing that the new design did not repudiate separation of powers principles so much as improve upon them. Indeed, by granting the branches' partial agency in each other's powers, separation of powers would become a workable form of government on its own terms, something that pure legal separation could not accomplish insofar as the most powerful branch would subsume the powers of the other branches. *The Federalist* thus defends the new separation of powers system in the terms of the older conception that it was meant to replace, claiming that the addition of checks and balances would better limit the power of the government than it could as a mere legal doctrine. The emphasis on constraints is perhaps most obvious in the paradigmatic separation of powers essay,

[454] Herbert J. Storing, *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981), I:6; Jeffrey K. Tulis and Nicole Mellow, *Legacies of Losing in American Politics* (Chicago: University of Chicago Press, 2018), 41–42.

Number 51, wherein Madison writes that separation of powers and its concomitant checks and balances is necessary to prevent abuses of power because men are not angels. The exercise of governmental power is thus made more difficult through what is described ostensibly as merely mechanical checking and balancing. Separation of powers — and federalism — thus provide a "double security" to the rights of the people. The emphasis on constraints is particularly evident in the discussion of bicameralism in *Federalist* 51, wherein the purpose of bicameralism is explained solely in terms of restraining the power of the branch the framers presumed would become the most powerful given its proximity to the people. Given the emphasis on constraint in these key papers it is hardly surprising that the Constitution's separation of powers design has been characterized and understood primarily in these terms rather than in terms of positive purposes.

Even so, *The Federalist* explains in other places, as alluded to throughout this dissertation, that the Constitution is designed to achieve certain ends and to be adaptable to the various exigencies of unforeseen circumstances.[455] And, moreover, it points to the fact that the boundaries between the branches — at least at the margins — are not easily distinguished on the basis of a legal principle (though this point is not made in the essays specifically devoted to explaining and justifying the Constitution's separation of powers framework).[456] The last third of *The Federalist*, then, provides an account of how the branches accomplish their governing tasks not on the basis of a legal principle but in

[455] See, for example, Federalist 23 and 41.
[456] Federalist 37.

terms of how their independent grants of power and differentiated structural design features advance the positive purposes of the constitutional order, as briefly outlined in the introduction.

What is to explain the disconnect, then, between the canonical description of the separation of powers in Federalist 47-51 and the account offered here, which itself is based on what is purportedly a more holistic reading of *The Federalist*? Tulis and Mellow have argued, in answer to this question, that the canonical separation of powers essays in *The Federalist* reflect a sophisticated rhetorical strategy intended to downplay the novelty of the new constitutional design in order to secure ratification.[457] The actual theory of the new constitutional design — the move away from separation of powers, as it had been commonly understood, to a complex political system wherein the branches would negotiate the limits of their respective powers in politics as they advance political and constitutional aims — was never explicitly announced as such even as all of the core features of such a conception can be inferred from the account taken as a whole.

Regardless of whether this is the correct interpretation of the nature of the separation of powers as presented in *The Federalist*, the text itself does not provide conclusive and definitive evidence for the conclusions drawn here. Even so, the superiority of the political conception articulated in this dissertation — compared to its constraints-oriented, legalistic counterpart — is borne out by the case studies. In other words, regardless of the correct interpretation of *The Federalist* with regard to separation

[457] Tulis and Mellow, *Legacies of Losing in American Politics*, 54–59.

of powers, the political conception is the best understanding of the Constitution's assignments of power. Indeed, this dissertation has shown how a narrow focus on the legal strictures of the text is inattentive to larger constitutional ends, and, consequently, how such a focus can frustrate, even undermine, core constitutional commitments. Indeed, as argued above, attention to the legal strictures of the text, in many cases, helps to promote the purposes of the text. However, an overly legalistic conception of the text would require committing to the view that legal strictures should trump underlying purposes in every case in which they come into conflict. The case studies have shown that in instances where the particularities of certain situations create conflict between the literal strictures of the text and its underlying purposes, the political architecture view provides more resources for responding to the particularities of the situation in a constitutional way — and more resources to constitutionally evaluate such departures.

Hence, the branches worked together to achieve a way of maintaining the Constitution's structure (through the legislative veto) when both branches agreed that delegation was necessary to accomplish certain governmental tasks that could not be achieved through the regular legislative process, for whatever reason. The legalistic frame adopted by the Court undermined this constitutional adaptation agreed to by the branches, thus undermining separation of powers values — even on the legalistic conception's account — by cutting off Congress from its delegated legislative power even as it allowed the consolidation of power in the executive branch and bureaucratic agencies. Similarly, the architectonic view provides a way to both understand how executive agreements are not merely a constitutional rupture (no matter how necessary)

but the product of a principled division of labor and the logical outworking of institutional logics ultimately negotiated in practice by the political branches. The Constitution, in this view, is both elastic insofar as it can generate what appears, at first glance, to be a great deal of change and static insofar as the text itself constrains departures from the text, providing rhetorical resources for political negotiation. Finally, the political account, as demonstrated most thoroughly in the case on recess appointments, requires that the branches engage each other at the level of politics, providing arguments about their respective behavior. This kind of engagement is more likely to occur in political contestation — wherein the branches engage in iterated political arguments, justifying themselves publicly vis-a-vis each other — than if the branches are encouraged to judicialize their disputes, a process which both potentially obscures the actual political dynamics at play in the dispute and shrouds the debate in the technical jargon of the legal profession. In this way, leaving such disputes — even about determinate and clear constitutional provisions that bring the branches into conflict — to be contested politically enhances democratic accountability as interbranch arguments are animated by publicly accessible reasons that aid the public in their evaluations of politics.

This dissertation began by noting the ways in which separation of powers is viewed today as a "relic" of the past,[458] as "suffering through an enfeebled old age."[459]

[458] William G. Howell and Terry M. Moe, *Relic: How Our Constitution Undermines Effective Government--and Why We Need a More Powerful Presidency* (New York: Basic Books, 2016).
[459] Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford [England] ; New York: Oxford University Press, 2010), 208.

Such diagnosis, although recurrent throughout American history,[460] misunderstands the nature of the separation of powers insofar as it is inattentive to the fact that the Constitution was neither written nor intended as a prolix legal code but, rather, set into motion a dynamic political order that can adapt itself over time while maintaining the fundamental shape of the constitutional design through structured political conflict within and between governmental institutions. The political conception of the separation of powers articulated here and in the case studies allows for and fosters a government that is responsive to the needs of the moment insofar as the Constitution and its overarching commitments guide the political branches as they negotiate their boundaries in politics. The problem has not been that the branches are incapable of such constitutional adaptation — as demonstrated in both the chapters on the legislative veto and executive agreements. The problem has been inattentiveness to the higher order principles induced by an overly legalized conception of the Constitution's assignments of power, especially as such a conception has been incorporated into Supreme Court jurisprudence during the last half century. There is no panacea which can solve all of the complex problems of modern government. Nevertheless, this dissertation has shown that judicial deference to the political branches in their boundary negotiations, and greater attention by the branches to their own prerogatives, duties, and particular modes of constitutional reasoning, could produce a government which is at once more adaptable to modern demands and more faithful to the animating purposes of the constitutional order.

[460] Woodrow Wilson, *Constitutional Government in the United States*, Columbia University Lectures ... George Blumenthal Foundation 1907 (New York: Columbia University Press, 1947).

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